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No. 92-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a jury's award of punitive damages in an amount fifty times greater than the compensatory damage award violate the defendant's right to due process of law where the award does not bear any understandable relationship to the compensatory damages awarded and (a) the jury was presented with evidence of the defendant's net worth prior to determining any question of liability, (b) the jury was allowed to base its award of punitive damages on findings it made from the preponderance of the evidence, and (c) the review of the award for excessiveness is governed by whether the award is the result of bias or prejudice?

2. Do Sections 4b and 4c of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 6b, 6c, preempt state law which would otherwise create a private cause of action to recover compensatory and punitive damages for conduct described in those statutory provisions, so as to render erroneous an award of punitive damages in an amount four times the maximum statutorily prescribed civil penalty for a violation of those statutory provisions?

3. Did the U.S. Court of Appeals for the Eighth Circuit fail to comply with this Court's directive in Case No. 88-1483 by refusing, on remand, to consider issues fairly included within the questions presented for review by Clayton Brokerage Co. of St. Louis, Inc.'s earlier petition in this case?

STATEMENT OF PARTIES

Plaintiff-Appellee in the proceeding below was David T. Jordan. Defendant-Appellant below was Clayton Brokerage Co. of St. Louis, Inc.[1] Martin Rachlin was a defendant in the proceeding below but was dismissed prior to trial.

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[1] Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Norfoods, Inc. Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Norfoods, Inc.

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No.

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Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit has rendered two opinions in this case. On October 17, 1988, that court rendered an opinion which has been officially reported at 861 F.2d 172 and unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 24,346. On September 18, 1992, after that opinion had been vacated by order of this Court, *Clayton Brokerage Co. Of*

St. Louis, Inc. v. Jordan, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991), the Court of Appeals rendered a second opinion which is officially reported at 975 F.2d 539 and unofficially reported at [1990-92 Binder] Comm. Fut. L. Rep. ¶ 25,382.

The orders of the United States District Court for the Western District of Missouri dated February 5, 1987 (denying Clayton's motion for a new trial, judgment notwithstanding the verdict, or remittitur) and October 10, 1991 (denying Clayton's post-remand motions to vacate the judgment and award of punitive damages) from which Clayton appealed to the Eighth Circuit Court of Appeals have not been officially or unofficially reported.

These opinions and orders, and the unreported order of the Court of Appeals dated June 10, 1991, are reproduced in reverse chronological order as Appendices A through E to this Petition.

JURISDICTION

The decision of the Court of Appeals was entered on September 18, 1992. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the following statutory and constitutional provisions involved in this petition for certiorari are reproduced at Appendix F to this petition:

(a) U.S. CONST. amend. XIV

(b) U.S. CONST. amend. V

(c) 7 U.S.C. § 6b

(d) 7 U.S.C. § 6c

(e) 7 U.S.C. § 18(a)

(f) 7 U.S.C. § 25

STATEMENT OF THE CASE

In 1989, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") petitioned this Court to review a decision of the U.S. Court of Appeals for the Eighth Circuit affirming a punitive damage award of $400,000 — fifty times the amount of the compensatory damage award. *Clayton Brokerage Co. of St. Louis, Inc. v. David T. Jordan*, No. 88-1488 (filed March 9, 1989).

In addition to asking the Court to consider whether the punitive damage award was an excessive fine prohibited by the Eighth Amendment,[2] Clayton asked the Court to decide

> Whether an award of punitive damages against a defendant in a civil case is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?
>
> Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?
>
> Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. §§ 6b, 6c preempt state law which would otherwise apply to the conduct described in

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[2]Clayton's argument under the Eighth Amendment was later foreclosed by this Court's decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?

Clayton's Petition was granted without reservation of issues. *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991). The Court of Appeals' decision was vacated, and the case was remanded to the Court of Appeals with instructions to reconsider the case in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

On remand, the Court of Appeals treated this Court's order as a directive only to reconsider the specific arguments Clayton had previously made in the Court of Appeals and to determine whether *Haslip* had explicitly validated them.[3] The court refused to consider Clayton's claim that Missouri law does not apply sufficient constraints on the jury's discretion in awarding punitive damages to comport with the requirements of due process — even though Clayton's argument was grounded on the due process objections Clayton had previously made to the standard of proof and introduction of evidence of Clayton's net worth. The court also refused to consider the question of preemption posed in Clayton's Petition.[4]

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[3] For example, the Court of Appeals rejected Clayton's argument that use of the preponderance of the evidence standard of proof violated Clayton's right to due process of law because this Court had rejected a similar argument in *Haslip*. App. A, at pg. A-3. The Court of Appeals ignored the fact that this Court only stated that a higher burden of proof is unnecessary when the award is buttressed by other procedures. *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. at 1046, n. 11, 113 L.Ed.2d at 23, n. 11. The Court of Appeals made no finding that sufficient buttressing procedures were followed in this case.

[4] The Court of Appeals gave two reasons for refusing to address the preemption issue: (a) the issue was not involved in the *Haslip* case; and (b) Clayton first raised the question in its petition in Case 88-1483. The record reflects that Clayton's Petition to this Court was the first written document

(Footnote 4 continued on next page)

The Court of Appeals effectively held that Missouri's standard for determining excessiveness — that "punitive damages must bear some relation to the injury inflicted, though they need not bear any relation to the actual damages allowed" — passed constitutional muster under the standard announced by this Court in *Haslip* — "[i]t ensures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." App. A at pg. 4-5, *citing Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) and *quoting Haslip*, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

(Footnote 4 continued)

filed in the course of the proceedings in this case in which Clayton explicitly labeled its defense as one based on preemption. The record is also clear, however, that the defense was raised and preserved in Clayton's Answer filed in the District Court.

There, Clayton pled that those counts of the complaint seeking recovery on common law theories of liability failed to state a claim upon which relief could be granted. That pleading conforms to the requirements of Rule 8(b), Fed. R. Civ. P., which requires defenses to be expressed in "short and plain terms." While Clayton did not use the word "preemption" in its answer, it was no secret that Clayton believed the preemptive effect of the Commodity Exchange Act should bar the common law claims. Indeed, counsel discussed this point on the record during the trial. Tr. 1006-07.

Clayton did not seek a ruling from the District Court at trial on the defense pled in its Answer because by the time of trial, Clayton's defense on the theory of preemption had been foreclosed in federal courts within the Eighth Circuit by the decision in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984).

Similarly, Clayton did not pursue this theory when the case was initially appealed to the Eighth Circuit because it is the practice of the Eighth Circuit that each panel of the court is bound by the prior decisions of the Court. *See, United States v. Llewellyn*, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert. denied*, 464 U.S. 934 (1983). Raising the preemption issue would, therefore, have been futile.

This treatment of the case enabled the Court of Appeals to validate its earlier decision that had been vacated by this Court by, once again, affirming the judgment of the District Court. It compels Clayton to, once again, petition this Court for relief from a punitive damage award out of all proportion to the compensatory damages awarded.

The events giving rise to this case occurred in 1980 and 1981. At that time,[5] Clayton was a commodity futures broker registered with the Commodity Futures Trading Commission (the "CFTC") as a futures commission merchant ("FCM").[6] From December, 1980 through February, 1981, one of Clayton's associated persons,[7] Martin Rachlin, churned the account that Respondent, David T. Jordan ("Jordan") maintained with Clayton and improperly switched trades between Jordan's account and other accounts maintained with Clayton. As a result, the primary beneficiary of a number of futures transactions executed by Clayton on various contract markets[8] was Rachlin, rather than Jordan (for whose benefit the transactions were ostensibly being executed).

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[5] Shortly after the jury's November, 1986 verdict in this case, Clayton withdrew from the commodity futures business. Prior to that time, Clayton had been one of the largest retail brokers of commodity futures in the United States.

[6] Pursuant to 7 U.S.C. § 6f, persons who trade in commodity futures contracts for the accounts of their customers must qualify and be registered as futures commission merchants.

[7] Pursuant to 7 U.S.C. § 6k, any person associated with an FCM in a capacity which involves the solicitation or acceptance of customers' orders or the supervision of persons so engaged is required to qualify and be registered as an "associated person."

[8] Pursuant to 7 U.S.C. § 7, futures markets, or boards of trade, which meet certain requirements are designated as "contract markets" by the CFTC. Unless a board of trade is so designated, it is illegal for the board of trade to operate as a marketplace for commodity futures contracts.

The trades charged to Jordan's account resulted in a net loss to him of $7,923.50 on his investment of $10,000.00. He sued Clayton to recover this loss.

At trial, Jordan proved that Rachlin's conduct (for which Clayton was responsible) violated the antifraud provision of the Commodity Exchange Act (the "CEA"), 7 U.S.C. § 6b, and constituted a breach of fiduciary duty under Missouri law. He further proved that this misconduct was the proximate cause of his loss. Accordingly, Jordan was awarded $7,923.50 in compensatory damages — i.e., the full amount of the loss he claimed to have sustained — on each theory of recovery.

In addition to the award of compensatory damages, Jordan sought an award of punitive damages. To that end, Jordan introduced into evidence a statement of Clayton's net worth before the case was submitted to the jury. At Jordan's request, the District Court instructed the jury that if it found from the preponderance of the evidence that Clayton had breached its fiduciary duty to Jordan, it could award punitive damages in an amount which would punish Clayton and deter Clayton and others from similar conduct.

Clayton objected to the procedure and the instructions by which the jury was permitted to award punitive damages on the grounds that its rights to equal protection and due process were being violated. Clayton's objections were overruled.

The jury awarded Jordan $400,000.00 in punitive damages, an amount fifty times that of the compensatory damage award, and four times the maximum monetary penalty Congress prescribed for a violation of the antifraud provisions of the Commodity Exchange Act.[9]

Clayton's motion for a new trial or remittitur on the ground that the punitive damage award was excessive was denied. In

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[9] *See* 7 U.S.C. § 9.

making its ruling, the District Court was guided by Missouri precedents which hold that punitive damages need not bear any relation to the compensatory damages awarded, so long as they bear "some relation to the injury inflicted." App. E, at pg. A-28. Although there had been no evidence at trial that Jordan had sustained any loss or injury other than the monetary loss of $7,923.50, the District Court justified its ruling on the basis that

> the actual damages recoverable were limited and *probably* do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not 'altogether disproportionate' to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

App., E, at pg. A-30 (emphasis supplied).

Clayton appealed to the U.S. Court of Appeals for the Eighth Circuit, which then affirmed the award of compensatory and punitive damages. After this Court vacated the Court of Appeals' October, 1988 decision and remanded the case for reconsideration, the Court of Appeals remanded the case to the District Court.

While the case was pending before the District Court, Clayton filed two motions to vacate the punitive damage award. One motion asserted that the award was erroneous because it was rendered under Missouri law which was preempted by the antifraud provisions of the CEA. The other motion asserted that Clayton's due process rights were violated (a) because the punitive damages awarded by the jury are excessive to the point of violating Clayton's right to due process because they bear no understandable or reasonable relationship to Jordan's injury, as measured by the jury's award of compensatory damages, and (b) given the fact that the jury was presented with evidence of

Clayton's net worth and permitted to award punitive damages based on the preponderance of the evidence, the jury instructions and standards by which the award was subject to review were insufficient to assure that the punitive damages awarded were not greater than necessary to fulfill the functions of punishment and deterrence.

The District Court held a hearing to reconsider its earlier decision in light of *Haslip* and to resolve Clayton's motions. At the hearing, to further support its claim that the award of punitive damages was greater than what was necessary to achieve the objectives of punishment and deterrence, Clayton made an offer of proof pertaining to its withdrawal from the commodity futures business, its financial condition, and the fact that Mr. Rachlin's scheme, insofar as it involved order switching, was an isolated event. The District Court refused to hear or consider Clayton's evidence on these points. It denied Clayton's motions, and reaffirmed its earlier order of February 7, 1987.

Clayton once again appealed. As it had in the District Court, Clayton argued that the introduction of evidence of its net worth and the use of the preponderance of the evidence standard of proof (to which Clayton had objected on constitutional grounds during the trial) violated its right to due process of law. Clayton's arguments on this point were admittedly different than they had been when the case was initially appealed. This Court's decision in *Haslip* required that adjustment. Each argument made by Clayton on appeal had, however, been presented to the District Court by the time of the second appeal. Moreover, Clayton's arguments on the second appeal rested on the same constitutional provisions and the same facts on which Clayton had relied in its first appeal. As it had at each prior step in the proceedings, Clayton challenged the punitive damage award as excessive. In addition, Clayton raised the preemption issue that it had articulated in its Petition to this Court and in its post-remand motion filed with the District Court.

Despite the fact that each of Clayton's points on appeal had been raised in the District Court and were encompassed by the questions presented in its earlier Petition to this Court, the Court of Appeals refused to consider any arguments not made by Clayton in its initial appeal to the Eighth Circuit. Based on this limited review, the Court of Appeals affirmed the judgment of the District Court.

REASONS FOR ISSUANCE OF THE WRIT

The Court of Appeals' most recent decision in this case resolved an issue of federal constitutional law in a manner that conflicts with the principles enunciated in this Court's decision in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). That issue, and the issue of preemption of common law by the antifraud provisions of the Commodity Exchange Act, as amended, are issues of substantial importance which should be conclusively resolved by this Court.

The Court of Appeals arrived at its decision in part because it adopted an overly narrow view of its responsibilities to review these matters under this Court's directive to reconsider the case in light of *Haslip* following the Court's granting of Clayton's earlier petition for a writ of certiorari.

The writ should issue to enable the Court to resolve the unsettled questions of federal law presented by this case, to ensure that the directive of the Court's order in Case No. 88-1483 has been carried out, and to give guidance to the lower courts and litigants concerning the procedures to be followed when this Court grants a petition for a writ of certiorari, vacates the decision of the lower court, and remands the case for reconsideration.

A. The Court Of Appeals' Decision Conflicts With The Principles Enunciated In *Haslip*

In *Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court definitively held that the due process clause of the U.S. Constitution imposes limits on punitive damage awards and the procedures by which they are rendered. The Court upheld the punitive damage award in that case based on its conclusion that the procedures leading to the award and the standards by which the award was reviewed sufficiently limited the jury's discretion in setting the amount of

the award to assure that the award did no more than fulfill its proper purposes of punishment and deterrence. Those procedures, the Court said, "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Haslip*, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.

In this case, the jury's award of punitive damages was rendered and reviewed under standards prescribed by Missouri law, which requires that punitive damage awards "bear some relation to the injury inflicted and the cause thereof" but "need not bear any relation to the damages allowed by way of compensation." *See Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d at 88. The District Court concluded that the jury's award of punitive damages in an amount fifty times greater than the compensatory damages awarded is not excessive, because "the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff."[10] App. E, at pg. A-30.

The Court of Appeals affirmed the District Court's order, based on its conclusion that the standard by which the District Court reviewed the punitive damage award was consistent with the requirements of due process articulated by this Court in *Haslip*. With few exceptions,[11] most courts have reached similar conclusions when confronted, post-*Haslip*, with claims that jury verdicts awarding punitive damages in amounts many times

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[10] Plaintiff's pleadings contain no allegation that he sustained any loss or injury other than the diminution of the value of his account maintained with Clayton. There was no evidence at trial of any greater or different loss or injury.

[11] *See, e.g., Johnson v. Hugo Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (en banc); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991); *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991).

greater than the actual damages awarded are so excessive as to violate the defendant's right to due process of law. *See, e.g., TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, 61 U.S.L.W. 3400 (Nov. 30, 1992); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991); *Coyne v. Allstate Insurance Co.*, 771 F.Supp. 673 (E.D. Pa. 1991); *Commonwealth Lloyd's Insurance Co. v. Thomas*, 825 S.W.2d 135 (Tex. Ct. App. 1992); *Wolf v. Goodyear Tire and Rubber Co.*, 808 S.W.2d 868 (Mo. App. 1991).

Clayton submits that where, as in this and an ever growing number of other cases, courts review juries' awards of punitive damages for excessiveness by comparing the amount of any particular award to an unproven and undefined "injury inflicted" rather than to the jury's award of compensatory damages, the effect is to grant to the jury the very type of unlimited discretion to set the amount of the punitive damage award which this Court found problematical in *Haslip*.[12] The Court should grant Clayton Petition and issue its writ in order to determine whether such methods of review deprive defendants of their right to due process of law and to ensure adherence to the principles laid down in *Haslip*.

B. The Court Should Resolve The Longstanding Controversy Over Whether The Commodity Exchange Act Preempts State Law

In *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247, 255, 67 S.Ct. 1160, 1165, 91 L.Ed. 1468, 1474 (1947), the Court indicated that but for a savings clause which was then part of Section 4c of the Commodity Exchange Act, 7 U.S.C. § 6c, the antifraud provisions of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 6c, would probably preempt state law otherwise governing the conduct proscribed by those provisions. That savings

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[12] *See Pacific Mutual Life Insurance Company v. Haslip*, 111 S.Ct. at 1043, 113 L.Ed.2d at 20.

clause was repealed in 1974 pursuant to Section 402(c) of the Commodity Futures Trading Act of 1974, Pub. L. 93-463, 88 Stat. 1389, 1413 (the "CFTC Act").

Concurrently with the repeal of the savings clause previously found in 7 U.S.C. § 6c, Congress further amended the CEA to provide a full panoply of remedies and sanctions for conduct, such as that at issue in this case, proscribed by Section 4b of the CEA, 7 U.S.C. § 6b. A person registered as Clayton was with the CFTC can be subjected to administrative, civil and criminal penalties for engaging in conduct like that at issue in this case. *See* 7 U.S.C. §§ 9 (administrative action to preclude trading on commodity futures exchanges, revoke registrations, and impose monetary penalties), 13(c) (criminal penalties of fines and imprisonment), 13 a-1 (civil actions to enjoin or restrain violations). Additionally, such persons may be forced to compensate those damaged by their conduct through administrative reparation procedures, *see* 7 U.S.C. § 18, or private civil actions, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) (recognizing implied private rights of action for violations of the CEA).

In order to prevent over-deterrence, the CEA provides specific procedures that must be followed to sanction conduct proscribed by the statute. *See, e.g.*, 7 U.S.C. § 9. It further prescribes the factors that must be considered in determining the amount of monetary penalties to be assessed for violations of the statute. 7 U.S.C. § 9a. As these provisions make clear, Congress has made a policy decision about what remedies and sanctions are appropriate for conduct of the type at issue in this case, and the procedures that should be followed in meting out such sanctions and providing those remedies.

Since the savings clause was repealed, and these other provisions of the CEA were enacted or revised pursuant to the CFTC Act, numerous courts have struggled with the question of whether,

and if so, to what extent, the Commodity Exchange Act, as amended, preempts other law.[13] The issue has been resolved by

[13]*See, e.g., The American Agricultural Movement, Inc. v. Chicago Board of Trade*, 770 F. Supp. 407 (N.D. Ill. 1991), *aff'd in part, rev'd in part*, 977 F.2d 1147, 1992-2 Trade Cases ¶ 70,003 (7th Cir., Oct. 20, 1992); *Marshall v. Green Giant Company*, 942 F.2d 539 (8th Cir. 1991); *Khalid Bin Talal Bin Abdul Azaiz Al Seoud v. E.F. Hutton & Company, Inc.*, 720 F. Supp. 671 (N.D. Ill. 1989); *Bosco v. Serhant*, 836 F.2d 271 (7th Cir. 1987) *cert. denied*, 486 U.S. 1056, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988); *Point Landing Co., Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986) *aff'd*, 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982); *Kelly v. Carr*, 691 F.2d 800 (6th Cir. 1980); *E.F. Hutton & Co. Inc v. White*, [1987-90 Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,314 (D. Mass. 1988); *Babst v. Morgan Keegan & Co.*, 1987 WL 15322 (E.D. La. 1987); *Cady v. A.G. Edwards & Sons, Inc.*, 648 F. Supp. 621 (D. Utah 1986); *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203 (N.D. Ga. 1985); *McCarthy v. Paine Webber, Inc.*, 618 F. Supp. 933 (N.D. Ill. 1985); *Mallen v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 605 F. Supp. 1105 (N.D. Ga. 1985); *Embeita v. Heinold Commodities, Inc.*, [1984-86 Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,594 (E.D. Va. 1985); *Sall v. G. H. Miller & Co.*, [1984-86 Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,686 (D. Colo. 1985); *Zieg v. Shearson/American Express, Inc.*, 592 F. Supp. 612 (E.D. Va. 1984); *Peavey Company v. Mitchell*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,939 (W.D. Okla. 1983); *Taylor v. Bear Stearns and Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Vaccariello v. Financial Partners Brokerage, Ltd.*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,874 (N.D. Ill. 1983); *Strobl v. New York Mercantile Exchange*, 561 F. Supp. 379 (S.D.N.Y. 1983); *Gonzalez v. Paine, Webber, Jackson, & Curtis, Inc.*, [1982-84 Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,615 (S.D.N.Y. 1982); *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kansas 1979); *Poplar Grove Planting & Refining Co., Inc. v. Bache, Halsey Stuart, Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Ghandour v. Shearson Lehman Hutton, Inc.*, 570 N.Y.S.2d 541 (Sup. Ct. App. Div. 1991); *Poncy v. Shearson Lehman Bros., Inc.*, 20 Sec. Reg. L. Rep. (BNA) 26 (Fla. Cir. Ct. 1987) *rev'd*, 548 So.2d 1196 (Fla. Ct. App. 1989); *Rupert v. Clayton Brokerage Co. of St. Louis*, 705 P.2d 988 (Colo. Ct. App. 1985) *rev'd*, 737 P.2d 1106 (Colo. 1987); *Zimmerman v. Merrill Lynch*, 283 S.E.2d 639 (Ga. Ct. App. 1981) *rev'd*, 285 S.E.2d 181 (Ga. 1981); *Sinclair & Co., Inc. v. Gurule*, 757 P.2d 225 (Idaho Ct. App. 1988); *Paine, Webber, Jackson, & Curtis, Inc. v. Conaway*, 515 F. Supp. 202 (N.D. Ala. 1981); *WestLake v.*

(Footnote 13 continued on next page)

those courts in different ways for different reasons. *Compare, e.g., Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982)(no preemption); *Haines v. First Commodity Corp. of Boston*, [1980-1982 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980)(Commodity Exchange Act preempts state law); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.E. 2d 567 (N.C. Ct. App. 1978) (Commodity Exchange Act preempts state statutes, but not state common law).

The controversy over the preemptive effect of the CEA does not persist simply because the lower courts have disagreed over the proper resolution of the issue. The volume of trading in the futures markets and the volatility of prices in highly leveraged transactions frequently results in traders sustaining substantial losses in short time spans. On the retail level, most orders are placed by telephone. These circumstances create a fertile ground for litigation.[14] When litigation involving commodity futures transactions does ensue, the prospect of large awards of punitive damages available under state law theories of recovery makes the monetary stakes of the litigation enormous even where

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(Footnote 13 continued)

Abrams, 504 F. Supp. 337 (N.D. Ga. 1980); *Singer v. Clayton Brokerage Co. of St. Louis, Inc.*, 620 S.W.2d 720 (Tex. Ct. App. 1981); *Haines v. First Commodity Corp. of Boston* [1980-82 Binder], Comm. Fut. L. Rep. (CCH) ¶ 21,088 (Mass. Super. 1980); *Bache-Halsey-Stuart, Inc. v. Hunsucker*, 248 S.E.2d 567 (N.C. Ct. App. 1978); *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637 (Tex. 1977).

[14] For example, during 1987 through 1990, Commerce Clearinghouse reported decisions in 583 actions in state and federal courts arising out of commodities futures trades. [1987-90 Binder] Comm. Fut. L. Rep. (CCH), 1987-90 Case Table. During 1990 through 1992, Commerce Clearinghouse reported decisions in an additional 462 cases. [1990-92 Binder] Comm. Fut. L. Rep. (CCH), 1990-92 Case Table. These figures, of course, do not reflect the volume of litigation in this area which is resolved without the issuance of a reported decision.

plaintiff's actual losses are modest.[15] This phenomenon can lead to protracted, time consuming and costly litigation over the causes of and responsibility for even relatively small losses.[16]

By contrast, the private remedies which Congress created for conduct violative of the Commodity Exchange Act limit persons injured by such conduct to recovery of actual damages. 7 U.S.C. §§ 18, 25. Thus, invocation of the defense of preemption, where available and when successful, materially reduces defendants' expense and exposure associated with claims arising out of commodity futures transactions.

Inevitably, then, the question of whether the Commodity Exchange Act preempts state law will continue to consume the time and resources of lower courts until this Court provides a definitive answer.

C. The Court Of Appeals Failed To Discharge Properly The Directive Of This Court

The Court of Appeals refused to consider Clayton's preemption argument on the ground that the issue was not addressed in

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[15] This case, in which the plaintiff was awarded punitive damages of $400,000, or fifty times the plaintiff's losses, is not particularly extraordinary in the annals of commodity futures litigation. In *DeRance v. PaineWebber, Jackson & Curtis, Inc.*, 872 F.2d 1312 (7th Cir. 1989), punitive damage awards totalling $20,500,000 were affirmed. *See also Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204 (9th Cir. 1982)(affirming $350,000 punitive damage award); *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984)(affirming $275,000 punitive damage award).

[16] This case clearly illustrates the effect of this phenomenon. Jordan's suit was initially filed in the District Court in 1982. It was not tried until 1986. In the interim, vast amounts of discovery were taken, not so much to develop evidence of the events and actions which directly affected Jordan's account, but rather to develop evidence of other, similar misconduct by Mr. Rachlin which was then used to support the claim for punitive damages. At trial, most of the five days of testimony were devoted to such evidence. Since the jury's verdict, the parties have spent another six years litigating appeals of these issues.

Haslip and was, therefore, outside the scope of this Court's remand order.[17] Through a similar rationale, the Court of Appeals held that it need not consider on remand whether the constraints in this case on the jury's discretion to award punitive damages were sufficient to afford Clayton due process of law.[18] These rulings give, at best, limited effect to that portion of this Court's Order which directed the Court of Appeals to reconsider Clayton's appeal.[19] They entirely ignore those portions of this Court's March 18, 1991 Order which granted Clayton's petition

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[17] The Court of Appeals also held that Clayton had waived consideration of its preemption argument because the argument had not been expressly raised in Clayton's first appeal. This rationale should have been effectively foreclosed by this Court's earlier granting of Clayton's petition for a writ of certiorari, in which Clayton asserted its preemption argument, without reservation of issues. Moreover, the rule against considering issues raised for the first time on appeal is prudential only, not jurisdictional. *See, e.g., Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988); *Struempler v. Bowen*, 822 F.2d 40 (8th Cir. 1987). Where, as here, the issue was presented for decision by the District Court before being presented in the Court of Appeals, the prudential considerations which justify the adherence to that rule are not served by enforcement of the rule.

[18] Unlike the preemption question, the Court of Appeals did not suggest that *Haslip* did not address this issue. Instead, this disposition was explained by the fact that Clayton had not articulated its due process arguments in the course of the initial appeal in the same fashion as was obviously appropriate once this Court announced the controlling principles of law in *Haslip*.

[19] The Eighth Circuit's refusal to consider facets of Clayton's due process arguments grounded on principles first articulated by this Court in *Haslip* because Clayton did not articulate them pre-*Haslip*, for example, does not seem compatible with the directive to reconsider the case in light of *Haslip*. *See, Board of Trustees v. Sweeney*, 439 U.S. 24, 26, 99 S.Ct. 295, 297, 58 L.Ed.2d 216, 219 (1978) (Stevens, J., dissenting).

without reservation of issues and vacated the Court of Appeals' prior decision.[20]

Although the Court vacated the Eighth Circuit's decision in its entirety, in effect sending the case back to the Court of Appeals for a new appeal, the Court of Appeals treated the case as though the previous proceedings in that court cast Clayton's arguments on appeal in stone.

This Court frequently issues orders granting a petition for certiorari, vacating the judgment below, and remanding the case for reconsideration in light of the holding in another case recently decided by the Court. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review In Cases Held for Plenary Decisions*, 11 HASTINGS CONSTITUTIONAL L.Q. 5 (1983).[21] The Court has, however, given

[20] By granting Clayton's Petition without reservation of issues, the Court at least seemed to indicate that all of the issues raised by Clayton's Petition, including the question of preemption, warranted consideration. *Cf., TXO Production Corp. v. Alliance Resources Corp.*, 1992 LEXIS 7450, 61 U.S.L.W. 3400 (Nov. 30, 1992)(limiting grant of certiorari to two of the questions presented). The Court of Appeals, however, concluded it was only required to consider due process challenges to the punitive damage award, because the phrase of the Order remanding the case expressly directed the Court of Appeals to consider the appeal in light of the principles enunciated in *Haslip*.

[21] Including the Order entered in this case, the Court issued no less than 12 such orders referencing the decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). *See, Portec, Inc. v. The Post Office*, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Reserve Life Insurance Co. v. Eichenseer*, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Hospital Authority of Gwinnett County v. Jones*, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); *Fleming Landfill v. Garnes*, 111 S.Ct. 2882, 115 L.Ed.2d 1048 (1991); *Intercontinental Life Insurance Co. v. Lindblom*, 111 S.Ct. 1575, 113 L.Ed.2d 641 (1991); *Southern Life & Health Insurance Co. v. Turner*, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991); *AMCA Int'l Finance Co. v. Hilgedick*, 111 S.Ct. 1614, 113 L.Ed.2d 713 (1991); *Pacific Lighting Corp. v. MGW Inc.*, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *International Society of Krishna Consciousness v. George*, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991); *Church of Scientology of California v. Wollersheim*, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991); *Transamerica Occidental Life Insurance Co. v. Koire*, 111 S.Ct. 2253, 114 L.Ed.2d 706 (1991).

little guidance to the lower courts (or litigants) concerning the scope of review it intends that the lower courts afford litigants when cases are remanded in this fashion. *Id.* at 6.

As a result, the nature of the post-remand proceedings and the scope of review afforded litigants in those proceedings varies widely. For example, in *Eichenseer v. Reserve Life Insurance Company*, 934 F.2d 1377 (5th Cir. 1991), the court examined the sufficiency of the post-verdict review afforded the defendant in that case despite the fact that the defendant's initial due process challenge to the punitive damage award had been premised solely on a "void-for-vagueness" argument. *Compare Eichenseer v. Reserve Life Insurance Company*, 881 F.2d 1355 (5th Cir. 1989); *Eichenseer v. Reserve Life Insurance Company*, 682 F. Supp. 1355 (N.D. Miss. 1988). Similarly, in both *Wollersheim v. Church of Scientology*, and *MGW, Inc. v. Fredericks Development Corporation*, the courts upon remand considered whether the punitive damage awards entered in those cases complied with the due process requirements enunciated in *Haslip* despite the fact that the defendants had not previously raised "Haslip" challenges. *See Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Ct. App. 2d Dist. 1989); *Wollersheim v. Church of Scientology*, 6 Cal. Rptr.2d 532 (Ct. App. 2d Dist. 1992); *MGW, Inc. v. Fredericks Development Corporation*, 6 Cal. Rptr.2d 888 (Ct. App. 4th Dist. 1992). The post-remand review conducted by the Eighth Circuit in this case was, of course, much more limited.

In view of the Court of Appeals' failure to discharge its obligations under this Court's March 18, 1991 Order and the widespread inconsistency among lower courts' responses to orders like the March 18, 1991 Order in this case, the Court should issue its writ to enforce that Order and clearly define the lower courts' responsibilities in cases in which such orders are issued.

CONCLUSION

Two lower courts have been directed to review the punitive damage award in this case in light of this Court's decision in *Haslip*. Neither court concluded that the punitive damage award bears an understandable relationship to the compensatory damage award. Neither court questioned that the award was four times greater than the maximum civil penalty Congress prescribed for the conduct at issue. Both courts, however, found reasons not to set the award aside.

Such decisions are, unfortunately, more typical than atypical of the manner in which the lower courts have dealt with large punitive damage awards, even after this Court's decision in *Haslip*. The writ should issue in this case to assure that this pattern does not continue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3606

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.
Appellant,

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: February 10, 1992
Filed: September 18, 1992

Before FAGG, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Clayton Brokerage Company appeals from a decision of the district court[1] denying Clayton's motions to vacate the judgment against it and to vacate the punitive damages award. We affirm.

I.

David Jordan established a commodity futures trading account with Clayton Brokerage Company (Clayton) in mid-1980. One of the brokers at the firm fraudulently churned the account, resulting in a $7,923.50 actual loss to Jordan and $5,292.00 in commissions to the broker. Jordan sued, claiming breach of fiduciary duty, fraudulent misrepresentation, and violation of the Commodity Exchange Act (CEA), 7 U.S.C. § 6(b). The jury

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[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

found for Jordan and awarded actual damages, as well as punitive damages in the amount of $400,000. On appeal, we upheld the punitive damages award as not excessive under Missouri law. *Jordan v. Clayton Brokerage Co.*, 861 F.2d 172 (8th Cir. 1988) (*Jordan I*). We also rejected Clayton's claims that punitive damages awards require a standard of proof higher than "by a preponderance" and that admission of evidence of Clayton's net worth violated its equal protection rights. *Id.*

Clayton petitioned the Supreme Court for a writ of certiorari. The Supreme Court remanded the case to us for consideration in light of its decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). We remanded it in turn to the district court. Clayton moved to vacate the judgment and for judgment in its favor on the claims for fraudulent misrepresentation and breach of fiduciary duty. Clayton also moved to vacate the punitive damages award on the grounds that the award violated Clayton's rights to due process and equal protection. The district court denied these motions, and Clayton now appeals.

II.

The first issue raised in Clayton's petition for certiorari was whether a civil punitive damages award violates a defendant's right under the eighth amendment to be free from excessive fines. Clayton dropped this issue on remand to the district court, as well it should have in the light of the Court's intervening decision in *Browning-Ferris Indus. v. Kelco Disposal. Inc.*, 492 U.S. 257 (1989).

The second issue Clayton raised was whether the Commodity Exchange Act preempts state common law for fraud. The district court believed that the issue was outside the scope of the Supreme Court's remand. We agree. Clayton contends that the Supreme Court, by granting the petition for certiorari and remanding for reconsideration in the light of *Haslip*, directed the court to consider all of the issues raised in its petition. This

argument is without merit. *Haslip* does not involve the CEA. Thus, this is a new issue before us. Preemption is an affirmative defense which Clayton did not plead. *See First Nat'l Bank v. Aberdeen Nat'l Bank*, 627 F.2d 843, 851 (8th Cir. 1980); Fed. R. Civ. Proc. 8(c). "'As a general rule, we do not consider arguments or theories on appeal that were not advanced in the proceedings below.'" *Warren v. City of Lincoln. Neb.*, 864 F.2d 1436, 1439 (8th Cir.) (en banc) (quoting *Wright v. Newman*, 735 F.2d 1073, 1076 (8th Cir. 1984)), *cert. denied*, 490 U.S. 1091 (1989); *see also Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016, 1017 (1988). This issue is not properly before us, and we will not consider it.

The third issue Clayton raised was whether a punitive damages award is constitutionally permissible when wrongdoing is established by a preponderance of the evidence rather than beyond a reasonable doubt. Clayton raised this issue initially in the district court and then appealed to this court, where we decided against Clayton. *See Jordan I*, 861 F.2d at 178 ("[P]unitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt.").

The Supreme Court considered and explicitly rejected an identical challenge in *Haslip*. 111 S. Ct. at 1046 n.11. The Court observed, "[w]e have considered the arguments raised by Pacific Mutual . . . as to the constitutional necessity of imposing a standard of proof of punitive damages higher than 'preponderance of the evidence.' . . . We are not persuaded, however, that the Due Process Clause requires that much." *Id.* Consequently, Missouri's standard of proof for awarding punitive damages satisfies the constitutional requirements of due process set forth by the Supreme Court in *Haslip*.

The fourth issue Clayton raised was whether a defendant's rights to equal protection and due process are violated when a jury is presented with evidence of the defendant's net worth. This

issue was raised before the district court and appealed to this court in *Jordan I*, although it was framed only as an equal protection argument. We decided against Clayton on this issue because the district court admitted evidence of net worth not on the issue of whether to award punitive damages, but for the jury's consideration as to the amount of punitive damages to award if it found first that Clayton's conduct was malicious. *Jordan I*, 861 F.2d at 178. Having reviewed *Jordan I* in the light of *Haslip*, we see no reason to change our decision. Jury Instruction No. 12 informed the jury that it could award punitive damages as punishment for malicious conduct, defined "malicious," told the jury that a punitive damages award was discretionary, and told the jury to determine any damages with "calm discretion and sound reason." The instruction further told the jury that it could award "punitive damages in such a sum as [it] believe[d] would serve to punish defendant and to deter defendant and others from like conduct." Thus, the instruction was essentially similar to that given in *Haslip*.

Once awarded, a court may reduce or reverse punitive damages in Missouri only if the award "is the product of bias or prejudice or is otherwise an abuse of discretion." *Kerr v. First Commodity Corp.*, 735 F.2d 281, 289 (8th Cir. 1984). In making this assessment, the court is to take several factors into account. First, punitive damages must bear some relation to the injury inflicted, though they need not bear any relation to the actual damages allowed. *Wheeler v. Community Fed. Sav. & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985). The court should then assess the character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant, as well as the amount which would serve to deter the occurrence of similar acts in the future. *Id.* at 87. The court should also consider mitigating and aggravating circumstances. *See Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280, 284-85 (Mo. Ct. App. 1973).

We conclude that Instruction No. 12 and the post-verdict standard of review make what the Court said about the Alabama procedure equally applicable in this case:

> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Haslip, 111 S. Ct. at 1045.

Accordingly, we reject Clayton's challenge to the admission of evidence concerning its net worth.

Finally, Clayton argues that the punitive damages award must be vacated because it does not comply with the due process requirements set out in *Haslip*. Specifically, Clayton claims that Missouri law does not apply sufficient constraints on the jury's discretion in making punitive damages awards. The district court noted that Clayton first raised this argument after remand and held that the issue should not be considered. We do not believe that the remand order requires us to consider an issue raised for the first time on remand. We therefore opt to exercise our discretion against reaching these constitutional claims. *See Warren*, 864 F.2d at 1439 (whether to reach an issue first brought on appeal is a discretionary decision); *Wright*, 735 F.2d at 1077 (same).

The district court's judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Case Number 82-1107-CV-W-9

Davit [sic] T. Jordan,
Plaintiff,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Defendant.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to xxxx hearing before the Court. The issues have been xxxx heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1) defendant's Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint is denied; and

2) defendant's Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection is denied.

Entered On Oct. 10, 1991

October 9, 1991
Date

R.F. Connor
Clerk

/s/ Tina Duer
(By) Deputy Clerk

Document #334

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,

Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND FOR JUDGMENT IN ITS FAVOR AS TO COUNTS I AND III OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND DENYING DEFENDANT'S MOTION TO VACATE THE PUNITIVE DAMAGE AWARD ON THE GROUNDS THAT IT VIOLATES DEFENDANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

[Filed: Oct. 9, 1991]

On June 10, 1991, the Eighth Circuit Court of Appeals issued the following Memorandum Order: "We remand this case to the District Court which should reconsider the award of punitive damages in light of *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032 (1991)."

The defendant filed 1) Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint, and 2) Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection.

On October 2, 1991, oral argument was heard on the applicability of *Pacific Mutual* to the punitive damages award in this case and on defendant's motions.

For the reasons stated on the record on October 2, 1991, it is ORDERED that:

1) defendant's Motion to Vacate Judgment and for Judgment in its Favor as to Counts I and III of Plaintiff's Second Amended Complaint is denied; and

2) defendant's Motion to Vacate the Punitive Damage Award on the Grounds that it Violates Defendant's Rights to Due Process and Equal Protection is denied.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

October 9, 1991.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal From the United States District Court
for the Western District of Missouri.

Submitted: May 22, 1991
Filed: June 10, 1991

Before WOLLMAN, Circuit Judge, and HEANEY and ROSS, Senior Circuit Judges.

ORDER

We remand this case to the district court which should reconsider the award of punitive damages in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1312

David T. Jordan,
Appellee,

v.

Clayton Brokerage Company of St. Louis, Inc.,
Appellant.

Appeal From the United States District Court
for the Western District of Missouri.

Submitted: January 13, 1988
Filed: October 17, 1988

Before HEANEY and WOLLMAN, Circuit Judges, and ROSS, Senior Circuit Judge.

HEANEY, Circuit Judge.

Clayton Brokerage Co. of St. Louis, Inc. (Clayton) appeals from the district court's judgment entered in accordance with a jury verdict awarding David T. Jordan compensatory damages of $7,923.50 and punitive damages of $400,000.00. We affirm.

I. BACKGROUND

On June 30, 1980, Jordan established a commodities futures trading account with Clayton. Prior to that time, Jordan had traded in commodities futures with several other firms and had lost money. Jordan's account with Clayton remained dormant until December of 1980 when he placed a trade and lost $677.50. Six weeks later, Jordan called Martin Rachlin, a Clayton broker and the branch manager of Clayton's Kansas City office. After some discussion, Jordan gave discretionary control over the

account to Rachlin. The account, however, was never formally listed as discretionary in Clayton's records.

Rachlin began placing trades in Jordan's account in earnest on February 3, 1981. By March 13, 1981, Rachlin had placed a total of 94 trades in the account and had lost $7,923.50. The trades generated approximately $5,292.00 in commissions. While Rachlin was placing trades in the account, Jordan questioned him about the short term trading strategy he appeared to be following and the losses incurred in the account. Rachlin assured Jordan that he was an experienced trader and that some short term trading was necessary to take advantage of market trends.

When the equity in Jordan's account was depleted, Jordan received a margin call and notice that no further trading could take place in the account until the call was met. Jordan then contacted Rachlin to complain. Rachlin falsely responded that the notice was the result of a computer error. Rachlin then transferred into Jordan's account a number of profitable trades he originally placed in other accounts in order to regain Jordan's confidence, bring the account out of deficit status, and further trade the account. Jordan was unaware of this action because the confirmation slips sent to him did not indicate that the orders had been switched into his account.[1] Eventually, Jordan closed the account and brought an action in federal district court alleging misrepresentation in violation of the Commodities Exchange Act, 7 U.S.C. § 6(b), and breach of fiduciary duty under Missouri common law.

At trial, Jordan proceeded on the theory that his losses were a small portion of those caused by a larger "plan" pursued by Rachlin and encouraged by Clayton's failure to take measures

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[1] The evidence at trial also indicated that on several occasions Rachlin switched into other accounts profitable trades originally placed in Jordan's account. Overall, however, Jordan's account posted a small net gain as a result of the order switching.

against Rachlin despite its knowledge of his actions. Pursuant to this plan, Rachlin gained discretionary control over an account and failed to record that control as required by company policy. Rachlin then excessively traded the account, generating large commissions for himself and Clayton, while establishing no coherent trading strategy. Rachlin also engaged in order switching. Rachlin switched some profitable trades into accounts he opened and controlled under fictitious names. More commonly, however, Rachlin switched orders in an effort to retain the confidence of investors, often bringing their accounts out of a deficit status in order to further trade them and generate additional commissions. If the customer complained, Rachlin misrepresented his skill and assured the investor that future trading would be profitable. Finally, if an investor complained directly to other Clayton employees, the investor was informed that his or her account was not listed discretionary and that, therefore, the losses were the investor's responsibility.[2]

The jury found for Jordan on both claims and awarded him $7,923.50 in compensatory damages and $400,000.00 in punitive damages. Clayton then brought a motion seeking a reduction of the punitive damages award or, in the alternative, a new trial. The district court denied the motion. Clayton appeals on two grounds: (1) that the punitive damages award is grossly excessive in relation to the actual damages, and (2) that the punitive damages award is the result of prejudice caused by improper admission of testimony detailing the larger plan.

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[2] Prior to trial, Clayton brought a motion in limine to exclude much of the "plan" evidence Jordan intended to introduce. After extensive briefing on the issue and a half day of oral argument, the district court substantially overruled Clayton's motion to exclude the evidence. The court did, however, limit evidence concerning four other Clayton customers, each of whom claimed to be victims of the larger plan, by prohibiting detailed testimony about the customers' account statements and trading transactions.

II. EXCESSIVENESS

Clayton argues that the punitive damages are plainly excessive. In particular, it cites the 50-1 ratio of punitive to actual damages as evidence of gross excessiveness. Clayton contends that under Missouri law, punitive damages in the range of 2-1 to 4-1 are reasonable. Jordan responds that the award is supported by the degree of malice shown and by Clayton's financial condition. Moreover, Jordan argues that the award is consistent with the punitive awards affirmed in *Kerr v. First Commodity*, 735 F.2d 281, 289 (8th Cir. 1984) (actual damages of $21,942.00 and punitive damages of $275,000.00) and *Wegerer v. First Commodity Corp.*, 744 F.2d 719 (10th Cir. 1984) (actual damages of $10,775.00 and punitive damages of $250,000.00).

We find *Kerr* instructive on this point. *Kerr* involved an action for commodities trading fraud against a commodities trading firm, brought pursuant to both federal law and Missouri state law. On appeal, the firm challenged the punitive award of $275,000.00 as excessive in light of the trial court's remittitur of actual damages from $75,000.00 to $21,942.00. This Court upheld the punitive award, stating:

> The degree of malice and the financial wealth of the defendant both are relevant in determining the proper amount of punitive damages. Missouri courts require a nexus between the wrong committed by the defendant and the amount of punitive damages, not between the amount of actual damages awarded and the amount of punitive damages. The jury has wide discretion in determining the amount of punitive damages, and that determination is not to be disturbed unless it is the product of bias or prejudice or is otherwise an abuse of discretion.

735 F.2d at 289 (citations omitted).

Thus, the fact that the punitive damages award in this case is significantly greater than the actual damages award does not, in

itself, require reduction of the punitive damages. Rather, we must examine whether there is a sufficient nexus between the wrong committed by Clayton and the amount of punitive damages. *See Wheeler v. Community Federal Savings and Loan Assn.*, 703 S.W.2d 83, 88 (Mo. Ct. App. 1986, (upholding actual damage award of $500.00 and punitive award of $100,000.00 stating that "[t]he general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation.*").

In this regard, the district court stated in its Memorandum and Order:

> [T]he jury could have concluded reasonably that [Clayton] placed Martin Rachlin in a position where [Jordan] was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence * * * placed in him resulting in substantial financial harm to [Jordan] and substantial financial gain to Rachlin and [Clayton]; that [Clayton] failed to supervise in any meaningful way Rachlin's handling of [Jordan's] account; that even when complaints about Rachlin were received, [Clayton] failed to investigate adequately; that [Clayton] ignored information it had that Rachlin was violating [its] regulations; and that because of [Clayton's] substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by [Clayton] in the future.

District Court Memorandum and Order at 6-7.

We have independently reviewed the evidence presented at trial concerning Clayton's conduct and affirm the district court's finding that the evidence fully supports the punitive damages award. For example, we note that James W. Hanson, a broker with Clayton, testified that in 1979 and 1980, while he was branch manager of Clayton's Kansas City office, he investigated

customer allegations that Rachlin engaged in discretionary and excessive trading in accounts listed as nondiscretionary. As a result of the investigation, Hanson concluded that Rachlin "had been making unauthorized trades in [two] customer accounts." Transcript at 296. Moreover, he testified that he informed his superiors in Clayton's home office in St. Louis of his conclusion. Despite this information, Clayton relieved Hanson from his position as branch manager and promoted Rachlin to that position. Transcript at 183.

With respect to excessive trading, Leslie Jordan, an expert retained by Jordan, testified that of the 32 days on which Rachlin could have traded Jordan's account, the account was actually traded on 24 days. In total, 84 trades were executed, generating an average daily commission of $165.39.[3] The expert testified

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[3] The expert also testified that 70% of the trades in Jordan's account were "day trades." The expert stated that such trades are indicative of discretionary control of the account by the broker due to the extensive communication that would be required for the customer to engage in such trading. In addition, the expert testified:

> Q. What is the basic interest or objective of a person who's a speculator in the futures market?
>
> A. Hope to have trading profits that exceed your cost of doing business, which is your commissions.
>
> Q. Now, taking that interest or that objective and bearing it in mind, could the trading that you described here in Mr. Jordan's account in your testimony today meet or satisfy that objective?
>
> A. I think it is heavily weighed (sic) against that possibility. Part — because it was predominantly day trades, that means the only profit that could be made was how much the market moved in that given day.
>
> The market moves in fixed limits. It can't go from $400 an ounce to $500 an ounce in a day. It can move from $400 an ounce to [$]410. If you are right, and bought early in the day when it was low and sold high, it still backs out how much you can possibly make in a given day. It must move more than the cost of doing commissions * * * .

(Footnote 3 continued on next page)

that in order to simply pay the commissions the account would have had to generate profits of more than 182 percent per month. The record also contains testimony that Clayton normally received at least a portion of the trading commissions. Transcript at 408.

Concerning order switching, Martha LaQuey testified that shortly after she was fired by Rachlin, she met with Ralph E. Bradac, an employee with Clayton's compliance department in St. Louis, and informed him that Rachlin was engaged in order switching.[4] Transcript at 405. Bradac's deposition, parts of which were read into the record at trial, indicates that he reported the conversation to Clarence Delbridge, then head of Clayton's compliance department. Bradac deposition at 127. In addition, the record establishes that even if Clayton had not been explicitly informed of the order switching, it had available to it computerized information from which it should reasonably have detected the order switching scheme. Delbridge deposition at 74-80;

(Footnote 3 continued)

> The problem with trying to make a profit with day trading is, that you got things stacked against you. First you have to overcome the commission cost, and then you have to have enough price move within the given time period to compensate for that and still give you a net overall profit.
>
> It's a technique that rarely produces a profit in speculative customer accounts that are paying full-commission rates.
>
> Q. Would you say that the trading in Mr. Jordan's account that has already been described was consistent with or was contrary to the basic interest of making a profit?
>
> A. I think having heavy concentration in day trades in a small speculative account, paying full commission, is a doomed strategy. The customer can't come out ahead. There are too many odds against him.

Transcript at 758-59.

[4] In contrast, Bradac's deposition reflects that the meeting did not occur until March 17, 1981, some four days after the last trade in Jordan's account and one day after Rachlin was fired.

transcript at 300-05. Thus, the record contains ample evidence from which the jury could have concluded that Clayton knew Rachlin was engaged in the order switching scheme.

In sum, the record fully supports the district court's finding that Clayton's acts and omissions are sufficiently related to the injury suffered by Jordan to justify the punitive damages award.

III. PREJUDICE

Clayton also argues that the punitive damages award resulted from prejudice caused by improper admission of evidence concerning the larger plan. Specifically, it contends that the evidence was improperly admitted because, under Federal Rules of Evidence 403 and 404, its probative value was far outweighed by its prejudicial and confusing effect on the jury. In this regard, Clayton points out that the bulk of the contested evidence concerns events that occurred prior to the trading activity in Jordan's account which are irrelevant to Jordan's claims. Clayton also argues that the single limiting instruction given the jury concerning the plan evidence was insufficient to overcome the prejudice caused by its admission.

Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This Court has had occasion to apply Rule 404(b) in a situation very similar to the instant case. In *Kerr v. First Commodity Corporation of Boston*, 735 F.2d 281, 286-88 (8th Cir. 1984), we considered a challenge to the trial court's admission of testimony of customer who were not parties to an action against a commodities futures trader. The customers testified that the trader

defrauded them in a manner similar to that alleged by the plaintiff.[5] We affirmed the district court's admission of the testimony, finding that the evidence was properly admitted on the issue of punitive damages to show knowledge, intent and absence of mistake on the part of the trader. *Id.; see also Wegerer v. First Commodity Corporation of Boston*, 744 F.2d 719, 724 (10th Cir. 1984).

Although admission of "other acts" evidence carries with it the potential to confuse the ultimate issues to be determined by the jury and to unfairly prejudice a party, we note that under Rule 404(b) the trial court "has the duty to balance the probative force of the evidence against any possible prejudicial effect it might have on the jury." *Kerr*, 735 F.2d at 286. Moreover, the balance struck by the trial court will be overturned on review only on a finding of abuse of discretion.

Our review of the record indicates that the district court carefully considered the evidence concerning the larger plan and admitted it to show knowledge, intent and absence of mistake on the part of Clayton. The record also discloses that the trial court limited in some respects detailed testimony concerning the larger plan. Accordingly, we hold that the trial court did not abuse its discretion in striking the balance that it did.

In addition, the record reflects that early in the trial, Clayton brought up the subject of a cautionary instruction. In response, the court requested Clayton to prepare such an instruction and offered to hear argument on the content of the instruction and when it should be given. From Clayton's subsequent silence on the issue, we can only conclude that it decided, as a tactical matter, to request the court to give the cautionary instruction only

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[5] In addition, we also considered a challenge to the district court's admission of two prior consent decrees entered against the trader.

with the other instructions at the close of the case.[6] In any event, we cannot say that the trial court's failure to give, sua sponte, a cautionary instruction during the course of the proceedings constituted an abuse of discretion.

IV. CONSTITUTIONAL CHALLENGE

Finally, Clayton argues that the punitive damages award violates the due process and equal protection clauses of the United States Constitution. Specifically, it contends that jury instruction number four violated its due process rights because it set forth a preponderance of the evidence standard as the

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[6] The record reflects the following exchange concerning the cautionary instruction:

> [Counsel for Clayton]: You advised us earlier, I believe it was in connection with the arguments on the motion in limine, that you would give to the jury a cautionary instruction dealing with the evidence of activities relating to the other customers, customers other than Mr. Jordan.
>
> We've looked at that Eighth Circuit case that has, I believe in the footnote, a cautionary instruction that was given in that case. If you wish, we would be willing to draft a proposed cautionary instruction for your review, or I guess we are asking whether you have drafted such an instruction, or just what we should do on that.
>
> I think we are getting more and more into that type of evidence. We assumed we would not ask for that until right before the other customers started coming on the stand. But we are already getting into evidence about other customers.
>
> I think Ms. LaQuey will undoubtedly testify about other customer's accounts, and so it may be that we would be requesting that fairly quickly.
>
> The Court: What I propose you do * * * is prepare the form of instruction that you wish that I give, show that to [plaintiff's counsel], let them look at it, and then if there is some disagreement about either the instruction or when it should be given, we can take it up at one of our numerous times away from the jury.

Transcript at 333-34.

burden of proof for awarding punitive damages. Clayton objected to the instruction at trial and challenges the instruction on appeal on the ground that the punitive nature of the award requires proof beyond a reasonable doubt. In addition, Clayton contends that admission of evidence as to its net worth violated the equal protection clause because the evidence irrationally implies it would be more appropriate to punish Clayton than another defendant under similar circumstances who had a lesser net worth.

In essence, we understand Clayton's contentions to be grounded on *Bankers Life and Casualty Co. v. Crenshaw*, __ U.S. __, 56 U.S.L.W. 4418 (May 16, 1988). At the time Clayton filed its brief in this case, the Supreme Court had noted probable jurisdiction but had not yet decided *Bankers Life*.

In *Bankers Life*, the petitioner insurance company sought to challenge a jury verdict awarding the appellee 1.6 million dollars in punitive damages. The insurance company contended that the award violated the Eighth Amendment's prohibition of excessive fines. In addition, it claimed that the award violated the due process and the contract clauses. The Supreme Court, however, declined to reach the issues, concluding that they were not raised and passed upon in the prior state court proceedings. 56 U.S.L.W. at 4420.

Initially, we note that the equal protection claim raised by Clayton was not raised by the appellant in *Bankers Life*. Moreover, although the appellant in *Bankers Life* claimed that the punitive award violated the due process clause, the Supreme Court characterized the chief issue raised in the case as "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases." *Id.* Thus, it is clear that the constitutional challenge to the punitive damages awarded in this case is very different from the challenge the petitioners sought to raise in *Bankers Life*.

More importantly, however, Clayton cites no case other than *Bankers Life* in support of its constitutional claims. Contrary to Clayton's due process claim, punitive damages are civil in nature and are therefore not required by the Constitution to be subject to proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 371-72 (1970). (Harlan J. concurring).

Similarly, Clayton's equal protection challenge is without merit. Clayton argues that admission of evidence of its net worth improperly suggested it would be more appropriate to punish Clayton than to punish a defendant with a lesser net worth. Yet, the evidence was not admitted on the issue of whether to impose punitive damages, nor was the jury instructed to consider such evidence in that determination. Rather, the jury was instructed to award punitive damages only if it found in favor of Jordan on the compensatory claim and if it found Clayton's conduct was malicious. *See* Jury Instruction No. 12. Thus, admission of the evidence did not violate Clayton's rights under the equal protection clause.

Accordingly, we affirm the judgment of the district court.

ROSS, Senior Circuit Judge, dissenting.

I respectfully dissent from the opinion of the panel majority and instead would reverse and remand the case to the district court with directions to order a remittitur of at least $300,000 of the $400,000 punitive damages award. A remittitur is appropriate in this case for at least two reasons. First, the record discloses that Clayton Brokerage Services Company (Clayton) was at most negligent in failing to supervise and investigate Martin Rachlin's activities. The degree of malice exhibited by Clayton does not justify the severity of the punitive damages levied against it.

Second, at a fifty to one ratio, the punitive damages award is so grossly excessive in relation to the actual damages that the

award represents a plain injustice. The punitive damage award imposed in this case does not exhibit the requisite correlation to the injury inflicted and the cause thereof. *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1299 (8th Cir. 1987).

Accordingly, I dissent from the majority opinion to the extent that it fails to find that the punitive damages award of $400,000 is excessive as a matter of law.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,
Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,
Defendant

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986, AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE AND DENYING DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL

Defendant asserts 37 separate grounds for granting its motion pursuant to Rule 50, Federal Rules of Civil Procedure, for judgment notwithstanding the verdict or, in the alternative, its motion pursuant to Rule 59, Federal Rules of Civil Procedure, for a new trial.

Standards for Determining Motions for New Trial and Judgment Notwithstanding the Verdict

Despite the jury verdict in favor of plaintiff, judgment may be entered in favor of defendant if that is the only reasonable conclusion. *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967). A motion for judgment notwithstanding the verdict challenges the sufficiency of the evidence to support the jury's

verdict. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 194 (1940). In deciding whether to grant defendant's motion for judgment notwithstanding the verdict, the Court should consider the evidence in the light most favorable to plaintiffs, assume that all conflicts in the evidence were resolved by the jury in favor of plaintiff, assume as proved all facts which plaintiff's evidence tends to prove, and give plaintiff the benefit of all reasonable inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409 (1962); *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977). The Court may not consider the credibility of the witnesses or the weight of the evidence. *McKnelly v. Sperry Corp.*, 642 F.2d 1101, 1105 (8th Cir. 1981). A motion for judgment notwithstanding the verdict should be granted only if the evidence, together with all reasonable inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, would not allow a reasonable jury to find in favor of the non-moving party. *Tribble v. Westinghouse Elec. Corp,* 669 F.2d 1193, 1195-96 (8th Cir. 1982), *cert. denied,* 460 U.S. 1080, 103 S.Ct. 1767 (1983).

While a motion for judgment notwithstanding the verdict is addressed to the sufficiency of the evidence, a motion for a new trial invokes the discretion of the Court by asserting that the verdict was against the weight of the evidence or that for other reasons of law the trial was manifestly unjust. *Montgomery Ward & Co.*, 311 U.S. at 251, 61 S.Ct. at 194. The granting of a new trial rests within the discretion of the trial court. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972). A new trial should be ordered where the verdict was against the weight of the evidence or to prevent a miscarriage of justice. *Day v. Amax, Inc.*, 701 F.2d 1258, 1262 (8th Cir. 1983). A new trial should not be granted merely because the Court feels that another result was more reasonable. *Fireman's Fund Insurance Co.*, 466 F.2d at 186.

Application of These Standards to Defendant's Motions Judgment Notwithstanding the Verdict

Viewing the evidence in the light most favorable to the plaintiff and affording the plaintiff all reasonable inferences to be drawn from the evidence, a reasonable jury could have found in favor of the plaintiff. Therefore, defendant's motion for judgment notwithstanding the verdict is denied.

Motion for New Trial

Defendant argues that it should receive a new trial because 1) the verdict is excessive and contrary to the clear weight of the evidence; and 2) the excessive verdict resulted from erroneous admission of evidence relating to other customer accounts which were unrelated to plaintiff's account.

On November 24, 1986, the jury returned a verdict in favor of plaintiff and against defendant for actual damages in the amount of $7,923.50 on two counts submitted to it, i.e., plaintiff's claim for fraudulent misrepresentation under the Commodity Exchange Act, 7 U.S.C. §§ 1-24, and plaintiff's claim for breach of fiduciary duties under the common law of the state of Missouri. In addition to the actual damages awarded on the breach of fiduciary duties claim, the jury assessed punitive damages in the amount of $400,000. Defendant argues that the punitive damage award was excessive.

Because the excessiveness issue arises with respect to the state law claim, Missouri law governs. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 477 (8th Cir. 1977) (the damage award may not exceed "that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim."). *See also Vanskike v. Union Pacific R. Co.*, 725 F.2d 1146, 1150-51 (8th Cir. 1984).

In Missouri, "[g]ranting a new trial on the ground of excessiveness of the verdict is equivalent to granting a new trial on the

ground that the verdict is against the weight of the evidence. Both involve the power of the trial court to weigh the evidence." *Pisha v. Sears Roebuck & Company,* 496 S.W.2d 280, 284 (Mo. Ct. App. 1973). *See also Mitchell v. Pla-Mor, Inc.,* 361 Mo. 946, 237 S.W.2d 189, 191 (Mo. 1951); *Wisner v. S.S. Kresge Company,* 465 S.W.2d 666, 670 (Mo. Ct. App. 1971).

Punitive damages are awarded in Missouri for the purpose of punishing the wrongdoing defendant and also for the purpose of deterring defendant and others from similar wrongful conduct in the future. *Wisner,* 465 S.W.2d at 669.

> The question of whether or not punitive damages shall be awarded and, if so, in what amount rests peculiarly in the discretion of the jury. In exercising such discretion and arriving at its conclusions, the jury must, of necessity, consider all of the facts and circumstances surrounding the incident and the party to the cause.

Id. (citations omitted).

In *State ex rel. St. Joseph Belt Ry. Co. v. Shain,* 341 Mo. 733, 108 S.W.2d 351 (Mo. 1937), the Court quashed its writ of certiorari to the Kansas City Court of Appeals thereby letting stand the lower court opinion that $4,000 punitive damages was not disproportionate to the actual damage award of $1. The Supreme Court quoted with approval the following from the opinion of the Kansas City Court of Appeals:

> *While it may be true that ordinarily a verdict for punitive damages should not be altogether disproportionate to the amount of actual damages returned,* yet in this case, the verdict for actual damages of $1 only was returned under the instructions of the court, for the reason of plaintiff's inability to introduce competent evidence of greater damages; and therefore the actual damages assessed furnish no proper guide for the amount of the punitive damages to be

> returned. Especially is this so as there is ample evidence in the record justifying a liberal award of punitive damages, and the inferences therefrom should not be limited and restricted by an arbitrary assessment of actual damages.

Shain, 108 S.W.2d at 365 (emphasis added).

In later cases, Missouri courts have cited *Shain* for the proposition that the punitive damages awarded must have some reasonable relation to the injury inflicted on the plaintiff. *See, e.g., Wisner*, 465 S.W.2d at 669 and *Holcroft v. Missouri-Kansas-Texas R. Co.*, 607 S.W.2d 158, 163 (Mo. Ct. App. 1980). "The general doctrine is that punitive damages awarded must bear some relation to the injury inflicted and the cause thereof, *though they need not bear any relation to the damages allowed by way of compensation*." *Wheeler v. Community Federal Savings & Loan*, 702 S.W.2d 83, 88 (Mo. Ct. App. 1985) (emphasis in original).

Based on the foregoing, Missouri does not require a direct proportional relationship between the actual damages awarded and the amount of punitive damages. However, Missouri does require that there be "some reasonable" relationship between the injury inflicted on the plaintiff and the amount of punitive damages.

In determining whether $400,000 is "altogether disproportionate" to the injury inflicted on the plaintiff:

> [A] review of the many cases awarding exemplary damages discloses that a hard and fast rule for the measuring of such damages cannot be declared. Each case turns more or less upon its own peculiar facts. The character and standing of the parties, the malice with which the act was done, and the financial condition of the defendant are elements which should be taken into consideration in awarding damages of this character [citation omitted], and the amount may be

> such as would serve to deter the occurrence of like acts in the future.

Wheeler, 702 S.W.2d at 87 (quoting *Sperry v. Hurd*, 267 Mo. 628, 185 S.W. 170, 174 (1916)).

The amount of punitive damages necessary to punish and deter cannot be precisely measured.

> Necessarily, the amount of punitive damages to effect punishment and determent can not be measured with mathematical preciseness. But this does not mean that juries have carte blanche in awarding punitive damages. Attendant circumstances, including mitigating as well as aggravating circumstances, must be taken into consideration, and the amount must be equated to the degree of malice, criminality or contumely characterizing the actor's conduct for which punishment or determent is deemed necessary.

Pisha, 496 S.W.2d at 284-85.

The financial worth of the defendant is an important factor for the jury to consider in arriving at an approximate punitive damage award. "Punitive damages have often been referred to as 'smart' money and it takes only slight consideration to realize that an amount of damages which might 'smart' one defendant might be entirely inconsequential to another." *Wisner*, 465 S.W.2d at 669-70.

Here, the jury could have concluded reasonably that defendant placed Martin Rachlin in a position where plaintiff was encouraged to place his confidence in Rachlin; that Rachlin used that position to violate the trust and confidence plaintiff placed in him resulting in substantial financial harm to plaintiff and substantial financial gain to Rachlin and defendant; that defendant failed to supervise in any meaningful way Rachlin's handling of plaintiff's account; that even when complaints about Rachlin were received, defendant failed to investigate adequately;

that defendant ignored information it had that Rachlin was violating defendant's regulations; and that because of defendant's substantial net worth, a punitive damage award of $400,000 was necessary to deter similar behavior by defendant in the future. As in *Shain,* the actual damages recoverable were limited and probably do not reflect completely the injury inflicted on plaintiff. Therefore, affording due deference to the jury's determination, the $400,000 punitive damage award bears a rational relationship to the injury inflicted; it is not "altogether disproportionate" to the injury inflicted on plaintiff. Accordingly, I will deny defendant's request that plaintiff be ordered to accept a lower damage award or face a new trial.

Defendant's argument that the punitive damages awarded were so large as to indicate an improper motive on the jury's part requires that defendant demonstrate some error occurred during the course of the trial that caused the jury to ignore the evidence and instructions. *Parks v. Consolidated Aluminum Co.,* 679 S.W.2d 348, 352 (Mo. Ct. App. 1984). Defendant argues that evidence about the complaints of other customers of Martin Rachlin and evidence about the manner in which Rachlin handled other customer's accounts were irrelevant and unfairly prejudiced and confused the jury. Defendant argues that the cumulative effect of plaintiff's other bad act evidence caused the jury to award $400,000 in punitive damages.

I was concerned during the trial that if plaintiff called all of the witnesses scheduled, the cumulative effect of plaintiff's "other account" evidence might deprive defendant of a fair trial. However, now that the trial is completed, I do not believe that defendant was deprived of a fair trial as a result of the admission of that evidence. Plaintiff's scaled down presentation of evidence about other accounts plus the instructions to the jury avoided the unfairness of excessive other acts evidence. Therefore, defendant has failed to show that anything happened during the trial that would have caused the jury to ignore the evidence and the instructions in awarding punitive damages.

For the foregoing reasons, it is hereby ORDERED that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are denied.

/s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

February 5, 1987.

APPENDIX F

1. The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend. XIV.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U. S. CONST. amend. V.

3. Sections 4b and 4c of the Commodity Exchange Act (7 U.S.C. §§ 6b, 6c) provide in pertinent part:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made or to be made for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive . . . such person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; . . .

* * *

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped or received in interstate commerce for the fulfillment thereof

(A) if such transaction is, is of the character of, or is commonly known to the trade as a "wash sale," "cross trade," or "accommodation trade," or is a fictitious sale;

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with

board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

4. Section 14(a) of the Commodity Exchange Act provides in pertinent part:

> Any person complaining of any violation of any provision of this Act . . . by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

7 U.S.C. S 18(a).

5. Section 22 of the Commodity Exchange Act provides in pertinent part:

> (a)(1) Any person . . . who violates this Act or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions referred to in clauses (A) through (D) of this paragraph and caused by such violation. . . .

7 U.S.C. S 25.

Supreme Court, U.S.
FILED
JAN

No. 92-1054

In The

Supreme Court of the United States

October Term, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

Petitioner,

v.

DAVID T. JORDAN

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

William C. Partin
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Partin & Partin
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January, 15 1993

QUESTIONS PRESENTED

Respondent is not satisfied with Petitioner's statement of the questions presented because Petitioner has failed to address the issues of (1) its procedural defaults regarding the Due Process/Haslip and CEA preemption questions it now seeks to raise, and (2) the findings of the District Court and Eighth Circuit that Petitioner did, in fact, make such defaults. In accordance with Supreme Court Rules 15 and 24.2, Respondent states the following questions which must be taken up before Petitioner's questions.

1. Can or should certiorari be granted or this case be held until decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479, in light of the following facts regarding petitioner's prolonged procedural default on the Due Process/Haslip question it has now sought to raise as its own Question No. 1:

A. Both the District Court and the Eighth Circuit held, on remand from this Court in Clayton Brokerage Co. v. Jordan, No. 88-1483, 499 U.S. ____, 111 S.Ct. 1298 (1991), that Petitioner had failed to raise any version of the Due Process/Haslip question until after that remand.

B. Petitioner made no attempt from the beginning of this case on December 28, 1982 until after this Court's remand on March 18, 1991 to raise any version of the Due Process/Haslip question, and did not raise it:

(i) by an F.R.C.P. Rule 51 objection or any other means at trial; or,

(ii) on appeal to the Eighth Circuit, or

(iii) in its petition for certiorari in No. 88-1483.

C. Both the District Court and Eighth Circuit conducted, *ex gratia*, a full Haslip review of the punitive damages award and the procedures and standards used to calculate and review it, and found that the award and the procedures and standards met all the requirements of Haslip?

2. Can or should certiorari be granted or this case be held until decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479, in light of the fact that Petitioner has attempted to mislead this Court into believing that on remand neither the District Court or the Eighth Circuit conducted a Haslip review, by repeatedly making such statements in its petition (pps.9, 10, 18, 19), though both the District Court and the Eighth Circuit conducted full Haslip reviews of the punitive damages award and the procedures and standards used to calculate and review it?

3. Can or should certiorari be granted in light of the following facts regarding Petitioner's prolonged procedural default on the CEA preemption question it has now sought to raise as its own Question No. 2:

A. Both the District Court and the Eighth Circuit held that the affirmative defense of preemption was not pleaded, as required by F.R.C.P. Rule 8(c), or otherwise raised,

B. Petitioner only first raised the CEA preemption question in this Court in No. 88-1483,

C. Petitioner expressly admitted in its petition (p.7) in No. 88-1483 that it chose not to raise the CEA preemption question in the District Court or Eighth Circuit because of the contrary controlling authority of Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984), holding that the CEA did not preempt an investor's Missouri common law tort claim for actual and punitive damages against his brokerage firm.

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STATEMENT OF CASE

Respondent is not satisfied with Clayton's Statement because it is substantially inaccurate in its discussion of the Courts' repeated holdings that Clayton waived, by failing to raise, the issues it has now attempted to raise here, (2) it wrongly asserts that on remand from this Court the Eighth Circuit did not conduct a Haslip review, when the Court in fact did so, and (3) it inaccurately states the facts of the case. Therefore, in accordance with Rules 15 and 24.2, a corrected statement on those subjects is provided.

1. Clayton's Waiver And The Courts' Holdings.

Each of the questions which Clayton now attempts to raise was long ago waived by Clayton, as both the District Court and the Eighth Circuit held, after remand from this Court. Jordan v. Clayton Brokerage Co., 975 F.2d 539, 541 (CEA preemption), 542-43 (Due Process/Haslip) (8th Cir.1992), following remand in Clayton Brokerage Co. v. Jordan, _____ U.S. _____, 111 S.Ct. 1298 (1991). Both the District Court and the Eighth Circuit held that Clayton failed to plead the affirmative defense of preemption or otherwise raise it during the trial or appeal, Jordan, 975 F.2d at 541, and both the District Court and the Eighth Circuit held that Clayton failed to raise the Due Process/Haslip question until after this Court's remand to the Eighth Circuit. Jordan, 975 F.2d at 542-43. The history of this case shows that Clayton first raised the preemption and the Due Process/Haslip questions some 6+ and 8+ years after this case began.

a. The History - The Trial

This case was filed on December 28, 1982, raising both CEA and Missouri common law claims against Clayton. Two claims against Clayton were submitted to the jury. Jordan, 861 F.2d at 173. The first claim was based upon the implied private damages action under the Commodity Exchange Act recognized by this Court in Merrill Lynch v. Curran, 456 U.S. 353 (1982). It sought only actual damages. The second claim was based upon Missouri common law. It sought both actual and punitive damages. Jordan, 861 F.2d at 173-74. The jury found in Mr. Jordan's favor on each claim, and awarded him a total of $7,923.50 actual damages and $400,000 punitive damages. Id.

Near the close of his case and as part of his punitive damages claim Plaintiff offered into evidence a series of financial data to prove Clayton's financial condition. Included among the data was Clayton's net worth, which Clayton termed "total stockholders' equity". Ex.48 (Consolidated Statement of Financial Condition). Clayton objected to admission of all the financial data except the net worth/total stockholders' equity figure; it expressly consented to admission of that figure:

> "Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury."

App.,p.1, quoting T.972. Only four days later in the instruction conference did Clayton first make any objection regarding the net worth evidence. App.,pps.8-9, quoting T.1062-63. However, the objection, found-

ed solely on the Equal Protection Clause, was merely directed to the upcoming closing argument and the way in which Clayton anticipated the net worth evidence would be discussed:

> "the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's."

Id. In the event, no such argument was made and the brief three-sentence discussion of net worth by Plaintiff's counsel passed without objection App.,pps.9-10, quoting T. 1097-98. At no time was any "Due Process" objection to use of the net worth evidence made, contrary to the assertion on Page 7 (4th paragraph) of Clayton's Petition.

b. Post-Trial And Appeal

In neither its post-trial motions, which were denied by the District Court, nor in its appeal did Clayton raise the CEA preemption or any version of the Due Process/Haslip question. Jordan, 861 F.2d at 174 (stating Clayton's grounds for appeal). Far from claiming some kind of inadequacy in the Federal and Missouri standards governing calculation and review of a punitive damages award - which is the gist of the Due Process question Clayton now attempts to raise - Clayton relied on those Federal and Missouri standards to challenge the punitive damages award as excessive under Missouri's common law standards. Jordan, 861 F.2d at 174-77.

After reviewing the Missouri standards and the District Court's extensive findings made under those standards, Jordan, 861 F.2d at 174-75, the Eighth Circuit made its own findings and held that the punitive damages award was not excessive. Id., 176.

Only two constitutional questions were raised. The first was a much-changed version of the Equal Protection objection regarding net worth. Ignoring the facts that at trial it had expressly consented to admission of its net worth figure and stated its objection only as an objection to an anticipated closing argument, Clayton now changed the Equal Protection objection to an argument that the Equal Protection Clause barred all net worth evidence. Jordan, 861 F.2d at 178. The second question was merely whether the Due Process Clause required proof of a punitive damages claim beyond a reasonable doubt. Id., 177-78. After the Eighth Circuit rejected all its arguments Clayton sought review here. Clayton Brokerage Co. v. Jordan, No. 88-1483.

In its Petition For Writ Of Certiorari Clayton made no Due Process/Haslip challenge to the Federal and Missouri standards for calculation and review of a punitive damages award. App., p.11, quoting "Questions Presented" in Petition For Writ Of Certiorari (No. 88-1483). Instead, though it had never raised the question before, it now attempted to raise a Browning - Ferris 8th Amendment excessive fines clause question. Id., Question 1. Its second question was the proof beyond a reasonable doubt question. Id., Question 2. For its third question it once again changed its Equal Protection argument, now casting it in terms of a proposed rule that net worth evidence not be presented

until after the jury has reached "a verdict on defendant's liability (a) for the tort alleged and (b) for punitive damages", and then added a reference to "due process". Id., Question 3. As its final question Clayton raised for the first time the question of preemption by the CEA. Id., Question 4. Clayton's Petition was filed in March 1989, and thus the preemption issue was not first raised until more than six years after this case began.

c. **Remand**

In March 1991, after Haslip was decided, this case was remanded to the Eighth Circuit for reconsideration in light of Haslip, the Order stating that:

> ". . . the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. _____ (1991)".

Clayton Brokerage Co. v. Jordan, 499 U.S. ____, 111 S.Ct. 1298 (1991). The Eighth Circuit in turn remanded to the District Court. Jordan, 975 F.2d at 541. Contending that this Court's remand Order was "without reservation" and allowed it to raise any issue on remand, Clayton filed a series of motions in which it attempted to raise the preemption and, for the first time, Due Process/Haslip questions. Jordan, 975 F.2d at 541.

The District Court ruled that the preemption question was outside the scope of remand, had been waived by Clayton's failure to plead and otherwise raise it, and lacked merit in light of numerous decisions finding that the CEA did not preempt state common

law claims by an investor against his brokerage firm, including the Eighth Circuit decision which the District Court expressly followed: Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984). Remand T. 71-72.

2. The Haslip Review

As for the Due Process question, the District Court held that Clayton had waived it by failing to raise it in any way until after remand. Jordan, 975 F.2d at 542. But, in addition, in order to provide a complete record, the District Court ruled the question on its merits, finding that the Federal and Missouri standards governing calculation and review of a punitive damages award met Haslip's requirements and, in fact, provided more protection than did the Alabama standards. R.T. 55-71.

The Eighth Circuit did much the same, ultimately holding both that the Due Process question had been waived by Clayton's failure to raise it and that the Federal and Missouri standards governing calculation and review of the punitive damages award fully met all the Haslip requirements. Jordan, 975 F.2d at 542-43. Each of the four questions raised in Clayton's certiorari petition in No. 88-1483 was reviewed, as was the newly raised Haslip question. The Browning-Ferris question was disposed of on the ground that Clayton had dropped it after remand. Jordan, 975 F.2d at 541. The CEA preemption question was disposed of on the grounds that it was outside that scope of the remand for reconsideration in light of Haslip, and had been waived by Clayton's failure to plead it as required by F.R.C.P. Rule 8(c) or otherwise raise it. Jordan, 975 F.2d at 541. The proof beyond a reasonable doubt question was disposed of on the ground that Haslip had re-

solved it. Jordan, 975 F.2d at 541-42. That left only the net worth question and the newly-raised Due Process/Haslip question.

Unable to ignore Clayton's 8+ year failure to raise any version of a Haslip-type Due Process question, the Eighth Circuit held that the question had been waived, pointing out that Clayton had never raised the question until after remand, Jordan, 975 F.2d at 542-43. But, then, *ex gratia*, the Court provided Clayton a full Haslip review, using the net worth question as the vehicle for that.

However, it first noted that Clayton had not preserved the net worth question either. While, Clayton was now presenting the net worth question as a "Due Process" question, it had never done that at trial or on appeal, the Eighth Circuit held; instead, Clayton had presented the question solely as an Equal Protection question, and in that form the question had been ruled against Clayton years earlier. Jordan, 975 F.2d at 542, citing Jordan, 861 F.2d at 178. Having made that record on Clayton's failure to preserve the net worth question, the Court then went on to use the question to conduct a full Haslip review, finding, as had the District Court, that

> "Instruction No. 12 (the punitive damages instruction) and the post-verdict standard of review make what the Court said about the Alabama procedure equally applicable in this case:
>
> 'The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion

> of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extend of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket'".

Jordan, 975 F.2d at 542, quoting Pacific Mutual Life Ins. Co. v. Haslip ___ U.S. ____, 111 S.Ct. 1032,1045 (1991) (parenthetical words added).

Thus, contrary to the assertions on Pages 9 and 10 of its Statement, Clayton received two full Haslip reviews on remand, one by the District Court and one by the Eighth Circuit, despite each Court's holding that Clayton had waived the Due Process/Haslip question by not raising it until after remand, 8+ years into the case.

3. The Trial And Evidence

Trial began on November 10, 1986. The evidence showed that since 1978 the Manager of and chief broker in Clayton's Kansas City office, other personnel there, and various officers in the St. Louis headquarters,

including the heads of the Compliance and Legal Departments, had carried out a plan for defrauding customers throughout the Midwest, the customers all having accounts in Clayton's Kansas City office. Infra. Testimony from Martha LaQuey, a former Clayton employee who had worked in the Kansas City office, from various employees and officers still at Clayton, and from Plaintiff and other customers, along with Clayton's own records, showed that the plan operated as follows.

First, the customer was induced to give control or "discretion" over the account to Clayton, by misrepresentations about the trading strategies that would be followed. Jordan, 861 F.2d at 173-74; and see T.468-70, 796, 886-87 Second, though discretion had been obtained and would be exercised, making the accounts discretionary, all documentation would show the accounts as nondiscretionary; later when customers complained about the broker's trading of their accounts, Clayton Compliance or Legal Department officials would reject the complaints by pointing to the "nondiscretionary" documentation and telling the customer that he had no basis for complaint because he was obviously doing all the trading himself. Jordan, 861 F.2d at 174. Third, the discretion would be used to trade the accounts excessively and without any rational strategy, for the sole purpose of generating commissions, id., 174, with 60% of the commissions going to Clayton and 40% to the broker. Fourth, the discretion was also utilized to switch orders (i.e., "open" positions or contracts which had not yet been matched with corresponding contracts to create a "trade") from one account to another, id.; by watching the markets' price

movements it was possible for a broker to determine whether an open position would - if closed in the near future - produce a profit or a loss. Orders that would produce a profit were switched out of customers' accounts and into accounts that the broker controlled through a confederate or owned under a fictitious name. Id., 174. Such orders could also be switched into the account of a customer who had suffered large losses due to the aimless excessive trading; the resulting profit would both placate the customer and allow more excessive trading. Id. Fifth, customer complaints to the broker were met by more misrepresentations about trading strategies and by assurances that those strategies would recoup past losses. Id. Finally, Clayton management protected the broker, covered up the plan and helped fend off customer complaints. Id., 174, 175-76, and infra.

Illustrative of the coverup was the response of Clayton's management to "whistleblowing" by employees or ex-employees from the Kansas City office. When customer complaints in early 1980 prompted James Hanson (then-Manager of the K.C. office) to investigate a broker's conduct, conclude that the broker was defrauding customers and report that to management, Clayton removed Hanson as Manager and replaced him with the broker, Martin Rachlin. Jordan, 861 F.2d at 175. And when in August 1980 Rachlin's ex-assistant, Martha LaQuey (fired by him for refusing to cooperate with the plan) reported the order-switching and the names of some Rachlin confederates to the #2 man in the Compliance Department and he passed that on to the head of the Department (id.,176), nothing happened; six months later David Jordan's account would be caught up in the

order-switching. Customer complaints had to be handled, too, as was exemplified by Ellen O'Connell's complaints. Though in mid-1980 she twice complained directly to Clayton's General Counsel that Rachlin took control of her accounts, was excessively trading them and ignoring her directions to stop (T.827-28, 835), and though Clayton's records showed extensive switching of orders into and out of her accounts (which could only occur when the broker had control over the trading T.754-56), Rachlin was not stopped or disciplined and Compliance rejected her complaints by asserting that she, not Rachlin, did all the trading. T.844-45, 853-57; Ex. 381. (Though a number of the customers who testified at trial, including Mrs. O'Connell, had complained to the CFTC, T.858, 904, no CFTC investigation ever took place.)

The tactics of management and Rachlin were extraordinarily successful; by the time Clayton took control over Mr. Jordan's account (January 1981) the plan had been in operation for over two years. Jordan was induced by a series of misrepresentations about market trends, the planned trading strategy, and the profitability of that strategy to give discretion over his account to Clayton. Instr.8; T.464-72. Though Clayton thus gained discretion over Jordan's account, its records continued to show the account to be nondiscretionary. Ex.3. That notwithstanding, Rachlin immediately began trading at his discretion; in the five-six weeks he traded the account, his aimless excessive trading wiped out the approximately $7,000 balance, required Jordan to pay a $970 margin call and generated $5,292 in commissions. Jordan, 173, 175-76. An expert witness described the trading as following no strategy, except to make as many trades as

possible, most of them day-trades, and stated that such an approach was "a doomed strategy" in which the "customer can't come out ahead", the heavy drain of commissions requiring a monthly profit of 182% merely to pay off the commissions and leave the account at a break-even point. Id., 175-76. That trading was supplemented and furthered by order-switching. Infra.

When Rachlin's excessive trading left the account with a negative balance after only two weeks, three orders that would produce profits were switched into the Jordan account from other customers' accounts, wiping out the negative balance and allowing the trading to continue, Jordan, 173; the trading that followed generated an additional $2,300 in commissions. Days later two orders that would produce profits were switched out of Jordan's account and into an account Rachlin owned under the fictitious name "Xochilt Flores". Id.,173, n.1; Exs.15, 40d. None of that was known by Jordan because the trading records Clayton furnished to customers did not show that orders had been switched into or out of his account. Jordan, 173. It was known to Clayton management. Compliance Department employee Bradac learned of the "Flores" account well before the end of the trading in Jordan's account and again informed the head of the Department, but all that was concealed from Jordan. T.204-05, 547-49. All told, David Jordan lost $7,923.50.

That was a substantial injury to Jordan because he was retired and had a net worth of only slightly over $100,000 (T.602); the loss represented some 7-8% of his net worth. (Clayton put Jordan's net worth into evidence, id., and later did not object but

consented to admission of evidence of its net worth, id., 972; both figures were pertinent to calculation of any punitive damages award). The jury's verdict was returned on November 24, 1986.

ARGUMENT

I. Clayton Long Ago Waived The Due Process And CEA Preemption Questions It Now Belatedly Attempts To Raise.

In recent cases this Court has emphasized again and again that the consequence of failure to timely raise a question in the courts below is that the question will not be considered here. E.g., Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). Both the District Court and the Eighth Circuit correctly held that Clayton waived, by not timely raising the Due Process and CEA preemption questions it now attempts to raise here. Jordan, 975 F.2d at 541 (preemption), 542-43 (Due Process). The record shows quite clearly that Clayton did not merely fail to raise the questions due to a brief oversight or omission; the preemption question was only first raised in the certiorari petition filed here in No. 88-1483, more than 6-1/4 years after this case began, and, as the District Court and Eighth Circuit agreed, the Due Process question was not raised until after the remand in No. 88-1483, more than 8-1/2 years after this case began. Clayton deliberately chose not to raise the questions.

Clayton flatly admitted in its petition in No. 88-1483 that it chose not to raise the CEA preemption question in the Courts below because of the Eighth Circuit's deci-

sion in Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984) that the CEA did not preempt an investor's Missouri common law claim for actual and punitive damages against his brokerage firm; in Clayton's own words:

> "This point was not pressed in the District court or the Court of Appeals because of the Kerr decision".

Petition, No. 88-1483, p.7. That is a deliberate default.

Rather than mount a Due Process challenge to the Federal and Missouri standards governing calculation and review of the punitive damages award, Clayton used those standards at trial and on appeal to argue that the award was excessive on common-law grounds. Jordan, 861 F.2d at 174-77. When that failed, Clayton turned next to another form of "excessiveness" argument, raising as its No. 1 question in No. 88-1483 a Browning-Ferris argument that the punitive damages award was excessive under the 8th Amendment's excessive fines clause. Even though Browning-Ferris contained a Due Process challenge of the type decided in Haslip and now raised by Clayton, Clayton did not itself raise such a challenge in No. 88-1483, instead arguing for proof beyond a reasonable doubt (Question No.2) and bifurcated trials (Question No.3) in punitive damages cases. App.,p.11. Only after this Court remanded for reconsideration in light of Haslip did Clayton finally raise the Due Process challenge, in May 1991, 8-1/2 years after the case began. Jordan, 975 F.2d at 542-43. Both the District Court and the Eighth Circuit expressly held that Clayton had not raised anything resembling a Due

Process/Haslip question until after remand. Jordan, 975 F.2d at 542-43. That, too, was a deliberate default.

Under such circumstances, it is not appropriate to provide Clayton any further review, either by granting certiorari in this case, or by holding this case until the decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479. Clayton's deliberate defaults should preclude any further review. Clayton's repeated efforts to raise issues it waived years ago have dragged this case out to inordinate length - the case is now more than 10 years old, and Clayton is now requesting review of questions it did not even mention in the first 6-1/4 or 8-1/2 years of the case. The deliberate defaults warrant immediate denial of Clayton's petition for certiorari, and so does the meritlessness of Clayton's Due Process and preemption questions, as shown hereafter by Sections II and III.

II. Clayton Was Accorded All The Protection Required By Haslip, And More, And Nothing In The Federal And Missouri Standards Governing Punitive Damages Warrants Certiorari.

In this case Clayton has already received full reviews of three separate sets of challenges to the punitive damages award: (1) a Missouri common law excessiveness challenge, Jordan, 861 F.2d at 174-77, (2) an 8th amendment excessiveness challenge, No. 88-1483, and Jordan, 975 F.2d at 541, and (3) a Due Process/Haslip challenge. Jordan, 975 F.2d at 542. None of those reviews found any flaw in the punitive damages award, or in the procedures and standards by which the award was made and reviewed.

The Haslip reviews conducted by both the District Court and the Eighth Circuit found that the punitive damages instruction and the Federal and Missouri standards governing calculation and review of the punitive damages award fully met the requirements of Haslip. Jordan, 975 F.2d at 542. Clayton does not attempt to point out any error in those findings. Instead it deliberately attempts to mislead this Court into believing that no Haslip review was conducted on remand. Petition, pps.9-10, 18. That is an implicit admission that unlike the TXO case, this case contains no certworthy issue.

Unlike the TXO case, this case does not involve a multi-million-dollar punitive damages award, but only a $400,000 award, which was found to be well within Clayton's ability to pay and properly calculated to deter further wrongful conduct by Clayton. Jordan, 861 F.2d at 175. Unlike the TXO case, this case does not involve a 500-1 ratio between punitive and actual damages, but only a 50-1 ratio, which both the District Court and Eighth Circuit held was not excessive in rejecting Clayton's common law challenge to the award. Jordan, 861 F.2d at 174-76. And, unlike West Virginia law defining the degree of wrongful conduct required to support a punitive damages award, Missouri law does not use nebulous terms such as "really stupid" and "really mean", but instead precisely defines three degrees of malice - implied malice, legal malice, and actual malice, Sanders v. Daniel Internat'l Corp., 682 S.W.2d 803, 807-08 (Mo.1984) - and then requires proof of a higher degree of wrongdoing for a punitive damages claim than for the underlying tort claim. Proctor v. Stevens Employment Services, Inc., 712

S.W.2d 684, 687 (Mo.1986) ("A higher degree of malice should be required to award punitive damages than to find liability" for the underlying tort).

The Federal and Missouri procedures and standards so belatedly challenged by Clayton have passed successfully through so many reviews because they afforded more than ample protection to Clayton. Clayton's Due Process challenge to them is so belated precisely for that reason: the procedures and standards gave so much protection to Clayton that it decided its best chance for success lay not in challenging them, but rather in using them to mount a common-law challenge to the award. Jordan, 861 F.2d at 174-77. Unlike the West Virginia procedures and standards at issue in TXO, nothing in the Federal and Missouri procedures and standards used in this case warrants certiorari.

III. The Commodity Exchange Act Does Not Preempt David Jordan's State Common Law Damages Action Against His Brokerage Firm.

Introduction

At a time when widespread civil and criminal fraud in the futures industry have forced yet another toughening of the laws and penalties applicable to the industry (Futures Trading Practices Act, P.L.102-546) and made the CFTC's long-admitted[1] need for

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[1] The CFTC has long admitted that it needs the help provided by private damages actions because it "is an agency with limited resources which are insufficient to per-

help in enforcing the laws pertaining to that industry seem greater than ever, Clayton contrarily proposes that this Court take away what has long been one of the most effective ways of providing that help: state common law damages actions against futures brokerage firms. Worse than the timing of the proposal is the manner in which it is made. The proposal, which takes the form of an argument that the 1974 amendment of the Commodity Exchange Act impliedly preempted all state common law damages actions, flies in the face of an obvious intent on the part of the 1974 Congress to preserve state common law and other private damages actions against brokers, brokerage firms and other market participants, an intent this Court recognized in Merrill Lynch v. Curran, 456 U.S. 353 (1982) (consolidated with Clayton Brokerage Co. v. Leist, No.80-895; Heinold Commodities, Inc. v. Leist, No.80-936; and New York Mercantile Exchange v. Leist, No.80-757, see, 456 U.S. 353, footnote) and says nothing at all about the longstanding judicial "consensus" that the CEA does not preempt such actions. Pettigrew v. Oppenheimer & Co., 582 F.Supp. 98,100 (D.Mass.1982) and see, cases cited infra.

Clayton's preemption argument has two basic parts. The first part begins by asserting that in 1947 in Rice v. Board of Trade this Court stated that but for the savings clause in Sec.4(c) of the CEA the Act would, in Clayton's own words, "probably preempt

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mit it to police all commodity-related transactions". Leist v. Simplot, 638 F.2d 283, 321 (2nd Cir.1980), quoting CFTC Brief, 34.

state law otherwise governing the conduct proscribed by those provisions", and then goes on to suggest that such preemption did occur in 1974 when the savings clause in Sec.4(c) was repealed. Petition,13-14, citing Rice v. Board of Trade, 331 U.S. 247 (1947). The second part of the argument then attempts to leave the impression that there is some unspecified uncertainty or "controversy" over the scope of the CEA's preemption. Petition, 15-16. Under closer examination Clayton's argument falls apart.

The savings clause in Sec.4(c) of the CEA was repealed because it would not have allowed the limited implied preemption of state regulatory statutes (e.g., Futures Acts, Securities Acts) intended by the 1974 Congress, and because it was made superfluous by the new savings clause included in the 1974 amendment of the CEA, a clause drafted primarily for the purpose of preserving from preemption private damages actions of the type at issue here. Infra.

As Sec. A shows in more detail, in 1974 Congress restructured regulation of the futures industry by barring State regulatory agencies such as Securities Departments from exercising regulatory authority over the industry. See, Sec. A infra. It did that by impliedly preempting the regulatory statutes, such as Securities Acts, which the State agencies were using to assert jurisdiction over the futures industry. Id. Because Sec. 4(c) of the CEA precluded *any* preemption of state law it had to be repealed in order for that limited preemption to occur; Phillip Johnson, who became the first Chairman of the new Commodity Futures Trading Commission (CFTC) created by the 1974 amend-

ment, explained how repeal of Sec. 4(c) furthered the Congressional intent to preempt state regulatory statutes:

> "More specific insight into congressional intent to preempt the substantive provisions of other regulatory statutes, as well as the agencies themselves, can be found in the remarks of Senator Curtis on the Senate floor, where he successfully urged the repeal of a sentence in the pre-existing Commodity Exchange Act. (Section 4c). Senator Curtis explained that (the) sentence was incompatible with the CFTC's new exclusive jurisdiction and the intended preemption of all state agencies".

Johnson, Commodity Futures Trading Act, 29 Vand.L.Rev. 1, 33-34 (1976) (emphasis and parenthetic material added). However, Congress intended that preemption go no further than that, and to insure such a limitation, drafted the new savings clause. The discussions which preceded and informed the drafting made clear that Congress intended to preserve private damages actions against market participants such as brokerage firms, believing them to be a significant help to the CFTC in policing the markets because the threat of such damages actions provided industry members with

> "a significant incentive . . . to obey the law".

Curran, 456 U.S. at 384. Accordingly, when this Court, in Curran, summarized the his-

tory of the new savings clause it described the clause as the result of an effort to preserve private damages actions:

> "And when several Members of Congress expressed a concern that the exclusive jurisdiction provision, which was intended only to consolidate federal regulation of Commodity Futures trading in the Commission, might be construed to affect the implied cause of action as well as other Court actions, Congress acted swiftly to dispel any such notion".

Curran, 456 U.S. at 387. Furthermore, state common law figured prominently enough in those Congressional discussions that it was clearly understood that Congress did not intend to preempt state common law damages actions; thus, CFTC Chairman Johnson wrote, shortly after enactment of the 1974 amendment:

> "Presumably, any injured person will continue to be able to sue in federal or state court on any available legal theory, such as breach of contract, violation of the Act, or common law fraud".

Johnson, CFTC Jurisdiction, 25 Drake L.Rev. 61, 71 (Fall 1975).

Judicial recognition of the simple scope of the CEA's preemption followed quickly upon the 1974 amendment's enactment. The first three cases decided after enactment established an analytical framework that is still in place today: the CEA preempts statutes which allow a regulatory agency to assert regulatory authority over the futures industry, but does not preempt traditional state common law damages actions by investors against market par-

ticipants. Texas v. Monex International Ltd., 527 S.W.2d 804 (Tex.App. 1975) (Texas Securities Act preempted); International Trading Ltd v. Bell, 556 S.W.2d 420 (Ark 1977) (Arkansas Securities Act preempted; common law damages action against brokerage firm not preempted); Bache Halsey Stuart Inc. v. Hunsucker, 248 S.E.2d 567 (N. Car.App.1978) (North Carolina Unfair Trade practices Act preempted; common law damages action against brokerage firm not preempted). Contrary to the suggestions in Clayton's Petition there has never been any judicial uncertainty or "controversy" over that. No Court has ever held that a state common law damages action like David Jordan's - an investor's action against his brokerage firm - is preempted by the CEA. E.g., Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir. 1984); Kotz v. Bache Halsey Stuart Inc., 685 F.2d 1204 (9th Cir.1982); Khalid Bin Talal v. E.F. Hutton & Co., 720 F.Supp. 671 (N.D.Ill. 1989); Mallen v. Merrill Lynch, 623 F.Supp. 203 (D. Ga.1985); Patry v. Rosenthal & Co., 534 F. Supp. 545 (D.Kan.1982); and see cases cited in Annotation, Commodities Broker's State Law Duties To Customers, 55 A.L.R. 4th 394 (1987, 1992 Supp.). A substantial reason for that is the legislative history of the 1974 amendment to the CEA, as Sec. A shows.

A. The CEA's Limited Scope Of Preemption.

The 1974 amendment of the CEA marked a watershed in regulation of the futures industry. Congress was confronted with the dual needs of (1) ending infighting among federal and state regulatory agencies for power over the industry, and (2) substantially strengthening regulation of the industry. It chose to meet the first need by preempting regulatory statutes that were being used by various agen-

cies to assert jurisdiction over the industry and "consolidat(ing) Federal regulation of commodity futures trading in the" new CFTC, Curran, 456 U.S. at 387, and to meet the second by expanding and toughening the CEA's penalties, while not only preserving State statutory and common law public or private actions, but expressly encouraging the states to use their civil and criminal laws of general applicability, such as anti-fraud statutes, against industry wrongdoers. Infra.

The 1974 amendment focused on State regulatory statutes such as Securities or Futures Acts because the States were increasingly using or enacting such statutes to enable their own regulatory agencies to assert authority over the futures industry; a witness at the Senate Agriculture & Forestry Committee's hearings on the 1974 amendment summed up that trend:

> "Various other states are considering regulation of commodities either through a commodities act or by defining commodity contracts as a security. Michigan has this area under active review. The Wisconsin Securities Act already defines a contract for future delivery of a commodity as a security. The State of Arizona recently amended its Securities Act to define a commodity as a security and the States of Texas and Arkansas have recently, either administratively or judicially, found certain types of contracts for future delivery of a commodity to be a security, subject to their state securities laws".

Hearings Before the Senate Committee On Agriculture & Forestry: Commodity Futures Trading Act, 93rd Cong., 2d Sess.,p.752. Such statutes

were to be preempted by the 1974 amendment, CFTC Chairman Johnson explained, in order to preempt the State agencies using the statutes; the amendment's intent was:

> "to preempt the substantive provisions of other regulatory statutes, as well as the agencies themselves",

Johnson, 29 Vand. L.Rev. at 33-34, a statement fully concurred in by a later Congress which followed the lead of its 1974 predecessor in amending the CEA:

> "The 1974 Act, which established the CFTC bestowed on the CFTC exclusion (sic, exclusive) jurisdiction to regulate futures trading and enforce the provisions of the Act, thereby preempting any State regulatory laws".

H.R. Rep. No.97-565,p.44 (1982). However, that was as far as the preemption went. Private damages actions and various public actions were preserved from preemption, as the history clearly shows. Both Curran and Judge Henry Friendly's opinion for the Second Circuit in Leist, on whose extensive analysis of the legislative history Curran expressly relied (387, Fn.86), point out the importance Congress placed on preservation of private damages actions as an aid to enforcement; as Curran succinctly stated, the threat of such actions provided industry members

> "a significant incentive . . . to obey the law".

Curran, 384; Leist, 638 F.2d at 314-15.

Reference to private actions abound in the 1974 amendment's history, as both Leist and Curran show. Curran, 456 U.S. at 384-88;

Leist, 638 F.2d at 308-15. They began in the House, in the remarks made by Chairman Poage in introducing the amendment, 119 Cong.Rec. 41333, Curran, 383-84, Fn.71, Leist, 308, and continued throughout proceedings in that body. Curran, 383-88, Leist, 308-09. In the Senate such remarks reached a high point during the discussion in Committee about the possibility that the House draft of the 1974 amendment (H.R.13113) could be read as preempting not only state regulatory statutes but a wide variety of other bodies of law, a discussion featured prominently in both Curran and Leist.

Many concerns about just such a reading of H.R. 13113 were voiced. For instance, the Justice Department's Antitrust Division wrote to Senate Committee Chairman Talmadge expressing such concerns about the Federal antitrust statutes (Leist, 315 n. 37), concerns echoed by House Judiciary Chairman Rodino. Leist, 314-15. Chairman Rodino also expressed the concern that the amendment could even be read as preempting all state common law. Id., 314. That, so Chairman Rodino told the Senate Committee, was not needed to accomplish the amendment's purpose and was not intended by the House:

> "there does not appear to be any legislative intention or established need to achieve this preemption".

Hearings On S.2485, S.2578, S.2837 and H.R. 13113 Before The Senate Committee On Agriculture & Forestry, p.260 (emphasis added). Chairman Rodino proposed a pre-emption scheme analogous to that of the Federal securities statutes (id.), which would leave the states' common law intact and untouched by pre-emption. Id.

The House Committee which had produced H.R.13113 confirmed that no such sweeping preemption had been intended, as Senate Committee member Clark reported. Curran, 386; Leist, 315. Senator Clark, and other members, too, objected to such preemption, their objections repeating the by-now widespread notion that H.R. 13113 could preempt not just the CEA implied private right of action, but many other "court actions" as well:

> "Section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate".

Curran, 456 U.S. at 386. In Curran's words: "It was". Id.. As this Court explained, "Congress acted swiftly to dispel any such notion", by adding the new savings clause to H.R. 13113. Curran, 456 U.S. at 387.

A clear concern evinced by Congress in discussing and drafting the new savings clause was to help the new CFTC in policing investor-broker relations; preservation of private damages actions, both Federal (implied private right of action under the CEA) and State (common law), would provide such help because such actions generally were brought by investors against brokerage firms, as in Curran itself (No. 80-203), 456 U.S. at 368. A second source of such help for the CFTC was found by Congress in state anti-fraud statutes which could be used by the States to protect investors from brokers, as the 1974 Congress told the States, in explaining why such statutes were not preempted:

> "(The 1974 amendment) does not prevent the states from enforcing their criminal anti-fraud statutes. The Committee realizes that many fraudulent schemes are devised to prey on the unsuspecting and unsophisticated investor. The States are encouraged to continue to utilize their criminal anti-fraud statutes to discourage such schemes",

Senate Report No. 94-73, pps.5-6 (1974) (parenthetical word added).

The 1978 and 1982 amendments did not see any change in the Congressional belief that the CFTC needed help in enforcing the law or in the importance given to private damages actions. "Widespread fraud" in certain areas of the industry persuaded Congress that the CFTC needed even more help, which the 1978 amendment sought to provide by allowing States to bring certain additional types of actions, including *parens patriae* actions. Leist, 638 F.2d at 319. That trend continued in the 1982 amendment, and in reaction to Clayton's and Merrill Lynch's challenges to the implied cause in Leist and Curran, which were then pending in this Court, Congress reiterated its belief in the importance of private damages actions, by expressly writing such an action into the CEA. House Rep.No. 97-565, pps.56-57, reprinted in U.S. Code Cong. & Admin. News, 97th Cong., 2d session, pps. 3905-06; Mallen, 623 F.Supp. at 204-06.

From the foregoing history the Courts have had no trouble divining the scope of the CEA's preemption, as sec. B shows.

B. Judicial Agreement Over The CEA's Scope Of Preemption

Over Pages 14-16 of its Petition Clayton attempts to leave the impression that there is judicial uncertainty or controversy regarding the CEA's scope of preemption. Thus, Clayton cites three cases - Kotz, Haines and Hunsucker - and says of them that "(t)he issue has been resolved by those courts in different ways for different reasons". Petition, 15-16. But even a quick reading of the cases shows that to be flatly untrue; the cases all simply apply the uniformly accepted rule that Congress intended the CEA to preempt regulatory statutes, but not state common law damages actions by investors against brokerage firms. Hunsucker, the first-decided of the three cases, held that an action under the North Carolina Unfair Trade Practices Act was barred because that statute was regulatory in its nature and thus preempted; however Hunsucker also emphasized that only such statutes were preempted and that a common law damages action by an investor against his brokerage firm was not preempted. Bache Halsey Stuart Inc. v. Hunsucker, 248 S.E.2d 567 (N.Car.App.1978). Haines merely involved the same kind of statute at issue in Hunsucker - the Massachusetts Deceptive Trade Practices Act - and like Hunsucker, found such a statute to be regulatory in nature and thus preempted. Haines v. First Commodity Corp, [1980-82 Binder], Comm.Fut.L. Rep. CCH, Sec. 21,088 (Mass. Super. Ct. 1980). Finally, Kotz did not hold, as Clayton's parenthetical note on Page 16 of its Petition suggests, that there was "no preemption" (Petition, 16) under the CEA; it merely held that the CEA does not preempt a state common law damages action for actual and punitive damages

by an investor against his brokerage firm. Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1207-08 (9th Cir.1982).

There is simply no judicial uncertainty or "controversy" over the CEA's scope of preemption. Congress made a sufficiently clear history for the 1974 amendment, and later amendments, that the Courts have had no difficulty in determining what preemption Congress intended. Had the Courts truly misread the Congressional intent as badly as Clayton suggests, the post-1974 amendments would surely have changed the savings clause to put in place the sweeping preemption which Clayton proposes Congress intended. That the post-1974 amendments did not change the savings clause is persuasive evidence that the Courts correctly read the savings clause (7U.S.C. sec.2) and the limitation Congress intended it to put on preemption, for, as this Court held in Curran: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change". Curran, 456 U.S. at 381-82.

CONCLUSION

Both the Due Process/Haslip and CEA preemption questions which Clayton has so belatedly attempted to raise are barred by its longstanding procedural defaults, as both the District Court and Eighth Circuit held. Furthermore, neither question presents the "special and important reasons" for review that are required by Rule 10. Thus, there is no basis for certiorari.

Nor is there any basis for holding this case until decision of TXO. Clayton's procedural default on the Due Process/Haslip question is so longstanding and so clearly delib-

erate that it cannot be entitled to any review on the merits. In any event, it has already received two full Haslip reviews and two full common law reviews, as well. All it hopes to do now is further delay the case, something it has already done for years. Certiorari should be denied forthwith.

Respectfully submitted,

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APPENDIX

TRANSCRIPT
(p. 972, line 11 - p. 976)

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would object to any reference to any other figure or wording on the consolidated statement of financial condition. Specific-

ally, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't -- that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with their outside counsel about contingent cases which are not identified specifically and it would lead to -- could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri,

and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be ready to the jury.

THE COURT: What authority do you have that, Mr. Partin, that would authorize you to read the total assets and the total liabilities?

MR. MATTHEW PARTIN: Well, I think --

THE COURT: And the stockholders' equity?

MR. MATTHEW PARTIN: Well, we got some cases in the supplemental trial brief we filed, Judge, Missouri cases, in which the Missouri Supreme Court -- let me start all over again.

There is one case cited in the supplemental trial brief called Haswell versus -- I think it is Liberty Mutual. It is 557 SW 2nd something something. It is a Missouri Supreme Court decision from the '70's, in which the plaintiff's counsel in

that case made an argument to the effect that the defendant's total assets are, and gave the figure, I suggest you make an award equal to, and then proposed a percentage figure of the total assets.

We don't propose to make that kind of argument, but I think the case is authority for the proposition that asset figures even by themselves could come in. Here, we are simply offering them to show how the $17 million figure was derived. I think that is within the authority of the line of cases that of course allow evidence of net worth.

We are simply showing the components that give rise to the net worth by reading the assets and the liability figures. If we are just reading one or the other, I suppose that might be a different matter, although in light of the Haswell case, I am not sure of that. But what we are doing here is simply showing how the net worth figure is arrived at.

As for the contingent liabilities paragraph, I don't know of any case in Missouri -- well, I should say I don't know of any reported appellate opinion in Missouri in which this issue has come up. We simply propose to read that there has been evidence in this case there are pending lawsuits against Clayton involving Mr. Rachlin and his activities in the accounts of other customers.

This is just really a subject that is unexplored in the case law, I think. It is conceivable to me that in a situation like this the jury might wonder about the effect of the pendency of the other lawsuits on the financial condition, more particularly on the ability to pay of the defendant.

So that paragraph is directed to that concern. I guess what I am saying in essence is, the paragraph is further indication beyond the numbers that we are going to

read of the ability of the defendant to pay a punitive damages award, which of course under Missouri law is the only reason for offering this type of evidence, to show an ability to pay.

MR. COWDEN: The only thing further, as the Court knows, the purpose of punitive damages is two-fold: Number one, to deter future conduct by this defendant or by others in a similar position.

Number two, to punish this defendant for acts that have occurred if the jury sees fit. In determining whether to punish, there is one figure on this exhibit that is relevant, and that is the net stockholders' equity. That is that amount of money that would be available to pay to either this plaintiff or anybody else at this point in time. So that is the figure that is relevant on the defendant's ability to pay and with respect to the issue of possible punishment.

I believe that is the traditional way in which corporations' net equity is shown to the jury is to read this one figure, to advise the jury the total of the stockholders' equity of Clayton Brokerage Company is, and then to quote the figure. It is up to plaintiff's counsel, I suppose, in closing argument if he so sees fit to advise the jury as to how they are supposed to use that number, if at all.

I think it would be very confusing to the jury if they are given a figure of $46,737,713 in total assets, and they are given a liability figure, and then they are given a total net stockholders' equity figure.

THE COURT: I agree with you. I think net worth is the only dollar figure under the circumstances of the information available here, that should be read to the jury.

TRANSCRIPT

(p. 1062, Line 10 - p. 1063, line 5;
Complete Statement Of Clayton's Net
Worth Objection In Instruction Conference)

The equal protection of the law clause comes into play because plaintiff has placed before the jury a figure which represents defendant Clayton's shareholders' equity or net worth, which was something in excess of $17 million. It is anticipated that plaintiff's counsel will argue in his closing argument that the jury should consider the net worth of the defendant in deciding whether to punish the defendant.

Therefore, the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's.

Therefore simply because this defendant has a certain net worth which is before the jury, it is subject to possible punishment, whereas another defendant with a smaller net worth would not be subject to the same punishment.

THE COURT: Anything further?

MR. COWDEN: No, Your Honor.

TRANSCRIPT

(p. 1097, line 18 - p. 1098, line 3; Plaintiff's Closing Argument Re Net Worth)

How much should you give in punitive damages? Basically, that is up to you. When we brought this suit, we had to name a figure. We did. We said $1,600,000.

Here are some guidelines; David Jordan was worth $100,000 when Clayton did this to him. You heard Mr. Baty read that from his application. $100,000 was Mr. Jordan's net worth, his life savings.

Clayton took $8,000 of that from him. Well, that is eight percent of his net worth. Clayton is worth about $17,500,000. But if you took eight percent from Clayton, that would be $1,400,000.

CLAYTON CERTIORARI PETITION
(No. 88-1483)

QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of punitive damages in a civil case violates a defendant's right under the Eighth Amendment to the Constitution of the United States to be free from excessive fines where the award of punitive damages is approximately fifty times the actual damages determined to have been incurred by the plaintiff?

2. Whether an award of punitive damages against a defendant in a civil cases is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?

3. Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a defendant's net worth prior to reaching a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?

4. Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. __6b, 6c preempt state law which would otherwise apply to the conduct described in those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

DAVID T. JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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No. 92-1054

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CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
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VS.

DAVID T. JORDAN,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

I.

The Questions Presented For Review Have Been Properly Raised and Preserved Throughout The Course of This Case

When Respondent, David T. Jordan ("Jordan") first offered evidence of Petitioner Clayton Brokerage Co. of St. Louis, Inc.'s ("Clayton") financial condition during the trial of this case, Clayton objected to the admission of *any* such evidence. Tr. p. 972, lines 11-17. (App. A). After making that objection, Clayton's counsel further argued that if Clayton's objection were overruled, Jordan should be limited to offering evidence of

Clayton's shareholder's equity, and precluded from reading to the jury the value of Clayton's assets or the footnote to Clayton's financial statement concerning its contingent liabilities. Tr. p. 972, lines 18 to p. 973, line 21. (App. A).

In the colloquy between the trial court and counsel that followed, Clayton's counsel stated Clayton's position that

> the imposition of punitive damages in a civil action under the present language of the jury instructions and the present standards on burden of proof, so forth, violates the constitutional rights of the defendant.

Tr. p. 980, line 25 to p. 981, line 3. The trial court was advised that Clayton's position was explained further in Clayton's motion for a directed verdict at the close of plaintiff's case. Tr. p. 980, lines 19-24. (App. A).

Clayton's written motion for a directed verdict was taken up by the trial court a short time later. Clayton's counsel then expanded on the constitutional underpinnings of Clayton's objection to submitting the claim for punitive damages to the jury, explaining

> that submitting the issue of punitive damages to the jury would deprive defendant of its constitutional rights, deprive defendant of due process under the Fourteenth Amendment to the U.S. Constitution and to its rights under the Fifth Amendment of the U.S. Constitution.

Tr. p. 1005, lines 20-25. The trial court asked for further elaboration, prompting the following discussion between counsel:

> [Clayton's Counsel]: [T]he basic argument is that the issue of punitive damages as framed in this civil action deprives the defendant of its constitutional rights, in that any penalty or punishment to be made against this defendant should only occur in a criminal or quasi-criminal

proceeding which involves a higher burden of proof than is imposed in this case.

The basic argument is that, therefore the defendant's due process rights are deprived. Further, that any punishment or penalty against this defendant should be carried out by the proper federal regulatory agency which at the present time is the Commodity Futures Trading Commission, and that —

[Jordan's Counsel]: Just for a point of clarification can I — are you making a separate argument on preemption now?

[Clayton's Counsel]: Yes, tied in that the preemption of the federal statutes and regulations allows punishment and penalty against a brokerage firm, such as Clayton Brokerage, and that, therefore applying punishment or penalty in a civil action deprives Clayton of its constitutional rights.

Tr. p. 1006, line 11- p. 1007, line 7.

This record clearly belies Respondent's assertions (a) that "Clayton expressly consented to admission" of evidence of Clayton's net worth (Resp. Br. at 2); (b) that Clayton's objection to the evidence was "founded solely on the Equal Protection Clause" with no "'Due Process' objection to the use of the net worth evidence" having been made (Resp. Br. at pp. 2-3); (c) that the preemption issue was first raised when Clayton filed its Petition for a Writ of Certiorari in Case No. 88-1483 (Resp. Br. at p. 5); and (d) that Clayton deliberately defaulted on the issue of preemption. (Resp. Br. at 14).[1]

---

[1] Clayton did not press the preemption issue before either the trial court or the panel of the court of appeals which heard Clayton's initial appeal because those courts were both bound to follow the Eighth Circuit's prior decision in *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984). *See*

(Footnote 1 continued on next page)

After the jury rendered its verdict, Clayton moved for a new trial, asserting as grounds therefore, among other things, the excessiveness of the punitive damage award. Clayton specifically argued in its new trial motion that the punitive damage award bore no reasonable relationship to the injury inflicted as measured by the compensatory damage award. *See* Memorandum in Support of Defendant Clayton Brokerage Company of St. Louis, Inc.'s Motion to Set Aside the Verdict, at page 7. (App. C).

These fundamental propositions which Clayton laid before the trial court — that the punitive damage award was excessive in relationship to the actual damage award and was rendered by a jury which improperly received evidence of Clayton's net worth and was permitted to award punitive damages based on the preponderance of the evidence — have formed the bases for Clayton's contention that the punitive damage award should be vacated at each successive stage of review. *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 861 F.2d 172, 174, 177 (8th Cir. 1988); *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 975 F.2d 539, 541, 542 (8th Cir. 1992). Moreover, once the case was presented to this Court, which has the authority to overrule the court of appeals' precedent on the issue of preemption, Clayton

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(Footnote 1 continued)

United States v. Lewellyn, 723 F.2d 615, 616 (8th Cir. 1983); *United States v. Howard*, 706 F.2d 267, 269 (8th Cir.) *cert denied* 464 U.S. 934 (1983). In fact, upon remand from the court of appeals, the trial judge confirmed that he would have refused to consider the preemption argument had it been pressed at trial because he was constrained to follow the *Kerr* decision. *See* Transcript of Proceedings on October 2, 1991 at page 4. (App. B). Under these circumstances, Clayton's effort to avoid wasting judicial resources by not pressing an issue before a court in which the outcome was predetermined can hardly be interpreted as a "deliberate default" prohibiting Clayton from presenting the issue for consideration to this Court, which has the power to overrule that precedent.

vigorously pressed its argument that Jordan's common law claims had been preempted by the CEA.[2]

Whether or not Clayton articulated its arguments in the same way at each stage of review is not dispositive of whether the errors to which Clayton's arguments are addressed have been properly preserved for review by this Court. Even where a petitioner's invocation of particular constitutional principles is inexplicit, the issues are preserved for review by this Court if they are within the clear intendment of Petitioner's contentions. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599, 98 L.Ed. 967, 977, 74 S.Ct. 757 (1954)(error preserved although petitioner invoked the commerce clause rather than the due process clause of the Constitution).

Throughout this case Clayton has clearly and repeatedly made the same contentions it now makes: that the punitive damage award is excessive in relationship to the compensatory damage award, that the jury was improperly permitted to hear evidence of Clayton's net worth and to decide the punitive damage claim based on the preponderance of the evidence, and that the state law which authorized the award of punitive damages is preempted. Jordan's conclusion that these questions are "barred" by "procedural defaults" (Resp. Br. at 29) is simply wrong.[3]

[2] In fact, upon remand from the court of appeals, Clayton moved the trial court to vacate the punitive damage award on the grounds that Jordan's common law claims were preempted. However, the trial court refused to consider Clayton's motion.

[3] With respect to the preemption issue, Jordan's waiver arguments are misplaced for the additional reason that the Eighth Circuit has fully considered the legal issues in the *Kerr* case, and has thus provided the Court with an ample basis on which to evaluate its reasoning regarding the preemption question. Jordan makes no contention that any further development of the record is needed in this case for the Court to adequately address these legal issues. *See Kiefer-Stewart v. Seagram*, 340 U.S. 211, 215 (1951)(no reason to refuse to hear issue on appeal on grounds of waiver when issue presented is purely legal and requires no further examination or appraisal of evidence).

II.

The Eighth Circuit Explicitly Refused to Consider Whether The Process By Which The Punitive Damage Award Was Rendered Afforded Clayton Due Process of Law

Jordan's assertion that the court of appeals complied with this Court's Order in Case No. 88-1483 by "ex gratia" providing Clayton "a full *Haslip* review" (Resp. Br. at 7) is refuted by the court of appeals' own opinion. Therein, the court stated:

> Finally, Clayton argues that the punitive damages award must be vacated because it does not comply with the due process requirements set out in *Haslip*. ... We ... exercise our discretion against reaching these constitutional claims.

Clayton Brokerage Co. of St. Louis, Inc. v. Jordan, 975 F.2d at 542-43.

The *Haslip* decision "shed new light on the law" so that, "if it had been available at the time of the court of appeals' [initial] decision, [it] might have led to a different result." *See Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978)(Stevens, J., dissenting). This Court's order remanding this case for reconsideration in light of *Haslip* certainly should have suggested to the court of appeals that *Haslip* was sufficiently analogous to this case, and potentially decisive of the issues presented by Clayton, as "to compel re-examination of the case." *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964); Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed.), § 5.11(b) at 280. The court of appeals' explicit refusal to address Clayton's constitutional claims demonstrates that it failed to properly re-examine the case.

III.

The Question of the CEA's Preemption of Common Law Causes of Action Is One Of Substantial Importance Which Should Be Addressed By This Court

Finally, Jordan argues that, despite its earlier decision to grant Clayton's Petition in its entirety, this Court should now refuse to consider the important question of whether the CEA preempts common law causes of action because of an alleged "longstanding judicial consensus" among the lower courts that such claims are not preempted. Jordan's argument is belied by the number of cases in which courts have struggled with this issue. *See* Clayton's Petition at footnote 13.[4] There is thus a clear need for

[4] Moreover, there is a clear divergence of opinion over the effect of Congress' repeal of the savings clause which the Court in *Rice v. Board of Trade of the City of Chicago*, 331 U.S. 247 (1947) found prevented preemption of state law. Although a number of courts have relied on the opinions of commentators, such as Phillip Johnson, concerning Congress' intent to occupy the field of commodity futures regulation, a contrary intent was clearly expressed by Senator Curtis, who introduced Section 402(d) of the CFTC Act on the Senate floor:

> MR. CURTIS. Mr. President, I understand that the intent of the bill is to grant exclusive jurisdiction over commodity futures trading to the new commission, except to the extent the bill specifies that other Federal and State agencies and Federal and State courts are to retain jurisdiction. However, as I understand it, *it is also the intent of the bill that, even in the cases where the State agencies and State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act as amended by the bill would preempt the field completely*, so that, if any substantive State law were contrary to or inconsistent with Federal law, the Federal law would govern.
>
> Section 4c of the existing Commodity Exchange Act contains the following sentence:
>
> "Nothing in this section or Section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections."

(Footnote 4 continued on next page)

guidance on this issue from this Court. Therefore, the Court should grant Clayton's Petition for Certiorari in its entirety, and should finally determine whether common law remedies are preempted by the CEA.

IV.

Conclusion

In granting certiorari in *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 3400 (Nov. 30, 1992), the Court recognized that the lower courts require further guidance in applying the principles announced in *Haslip*. While the issues presented in this case are not dissimilar from those which the

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(Footnote 4 continued)

> All of the transactions referred to in the sentence are covered by the existing act as amended by the bill. *In order to assure that Federal Preemption is complete, I believe that the sentence I quoted should be deleted from the Act.*

120 Cong. Rec. 30464 (Sept. 9, 1974) (emphasis added). Jordan can point to nothing in the legislative history which would support his contention that Congress had any purpose in repealing the savings clause other than that expressed by Senator Curtis.

Court will consider when it hears *TXO*, the case presents other issues which merit the Court's attention as well. For these reasons, the Court should grant Clayton's Petition for a Writ of Certiorari to resolve these issues.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

Kansas City, Missouri
November 10, 1987

DAVID T. JORDAN,
Plaintiff,

vs.

CLAYTON BROKERAGE COMPANY,
of ST. LOUIS, INC.,
Defendant.

TRANSCRIPT ON APPEAL

VOLUME IV (Pages 940-1135)
BEFORE THE HONORABLE D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE, and a jury.

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* * *

[Page 972 Lines 11-25]

* * *

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would further object to any reference to any other figure

[Page 973 Lines 1-21]

or wording on the consolidated statement of financial condition. Specifically, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't — that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with

their outside counsel about contingent cases which are not identified specifically and it would lead to — could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri, and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be read to the jury.

* * *

[Page 980 Lines 17-24]

* * *

THE COURT: Mr. Cowden, do you want to say anything about that:

MR. COWDEN: I might advise the Court that at the time we file our Motion for Directed Verdict at the close of plaintiff's evidence, that we intend to argue to the Court, among the other reasons stated in that motion, that a submissible case on punitive damages has not been made under the evidence presented.

* * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
THE HONORABLE D. BROOK BARTLETT, JUDGE

No. 82-1107-CV-W-9
October 2, 1991
Kansas City, Missouri

Civil

DAVID T. JORDAN,
Plaintiff,

vs.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

On Wednesday, the 2nd day of October, 1991, the above-entitled cause came on regularly for hearing before the HONORABLE D. BROOK BARTLETT, Judge of the United States District Court for the Western District of Missouri, sitting in Kansas City.

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* * *

[Page 3 Lines 16-25]

* * *

MR. KNICKMEYER: Thank you, Your Honor. Your Honor, as we perceive this matter there are three issues before the Court. First of all, does Missouri's law relating to punitive damages pass constitutional muster? Secondly, was the award of punitive damages rendered against Clayton Brokerage in this case an award which, of itself, can pass constitutional muster? And thirdly, whether or not the award is permissible because the Commodity Exchange Act preempts the state law which

[Page 4 Lines 1-25]

would allow the award of punitive damages in this case.

THE COURT: That issue foreclosed, isn't it?

MR. KNICKMEYER: Your Honor, I don't see it as being foreclosed. I think that when the Supreme Court accepted our petition for certiorari, without limiting the issues that were accepted for a cert, the Supreme Court indicated that that was an open issue.

I do agree with Your Honor that under the traditional rules that would apply in the 8th Circuit there is a controlling precedent in the 8th Circuit, the Kerr v. First Commodity Corp. case, which would ordinarily constrain Your Honor. In light of the unique history of this case, however, I think that that constraint is no longer what it might be. And, frankly, Your Honor, we are

arguing for a change in the law of the 8th Circuit in that regard and we think that it ought to be considered.

If it's —

THE COURT: Let's — we can dispose of that pretty quickly. I am obligated to follow the law of the 8th Circuit. I don't think it's my job to try to change the law in view of the clear precedent in the 8th Circuit. Now, you can argue that in front of the 8th Circuit, obviously, and they can change their view. But

[Page 5 Lines 1-7]

I don't think I'm authorized to. And furthermore, I don't think I'm authorized to under the limited basis on which I have this case.

So I think — I mean, unless you've got some reason why you think that I can deviate from a clearly applicable precedent in the 8th Circuit, I think my obligation is to follow that precedent.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 82-1107-CV-W-9

DAVID T. JORDAN,
Plaintiff,

v.

CLAYTON BROKERAGE COMPANY
OF ST. LOUIS, INC.,
Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT CLAYTON BROKERAGE COMPANY OF ST. LOUIS, INC.'S MOTION TO SET ASIDE THE VERDICT AND JUDGMENT ENTERED ON NOVEMBER 24, 1986 AND FOR JUDGMENT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

* * *

[Page 7]

III. The Punitive Damage Award Bears No Relationship to the Injury Inflicted on Plaintiff.

Under Missouri law, the amount of punitive damages awarded "must have some reasonable relationship to injury inflicted." *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666, 669 (Mo. App. 1971). In the present case, the amount of punitive damages awarded bears no relationship to the injury inflicted. The award is wholly out of line with awards in similar cases and with the particular circumstances of this case.

* * *